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Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

October Term, 1998

J. HOWARD FLINT, JR., AND CARLON S. FLINT

Petitioners,

v.

EVA L. DAVIS (IN VARIOUS CAPACITIES)

Respondents.

On Petition For A Writ of Certiorari
To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

When husband and wife, who have no children between them, declare their intent to provide for management of their assets during their lives "and a simplified means of accomplishing both lifetime and death transfers of those assets", and they carry out their intent (a) by establishing a revocable inter vivos trust into which they transfer substantially all of their assets, declaring that regardless of the source, each shall be deemed to have contributed 50%, (b) by contemporaneously with the execution of the trust, executing identical mutual wills that create a contract and that simply pour any remaining assets into the trust and provide **by incorporation into each will the original trust (unrevoked)** so that upon death, all assets will be administered and distributed as provided in the trust under the terms as in effect at the time of death, and (c) by providing in the trust that upon the death of the last to die, assets will be distributed 50% to the husband's sons by a previous marriage and 50% to the wife's relatives in Kansas, may the wife, after her husband dies with the trust and wills unchanged from the time of their execution, amend the trust, revoke it in part, and change her will so as to appropriate assets that would have gone to her deceased husband's children and distribute them to her relatives? **Do these facts**, supra, **when compared to the Chancellor's one decision** that the wife/settlor/trustee did revoke trust A (only) and in another decision that "the sole issue presented . . . [that the wife's (Ida Flint) second will after the death of her husband] is whether the paper offered for probate is or is not the will of decedent" and that there is "no reason why the last will and testament dated February 17, 1994, . . . may not be admitted to probate by this Court," **comprise a proper res adjudicata —the same previously decided issues as presented in the instant case** — for a plea in Bar?

LISTING OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Virginia were:

Planitiffs/Appellants:

J. Howard Flint, Jr.

Carlon S. Flint

Defendents/Appellees:

Eva L Davis, as Executrix of the Estate of Ida. L Flint;

Eva L Davis, as Co-Executrix of the Estate of Joseph Howard Flint;

Eva L Davis, Individually, and Eva L. Davis, as Co-Trustee, of the Flint Revocable Living Trust

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ASSIGNMENTS OF ERROR

1. The Chancellor erred in finding for a res adjudicata Plea in Bar in that he had previously held for an identical situation that after the death of J. Howard Flint, Sr., Ida L. Flint, the other settlor and a trustee of the Trust, had the unrestrained power to amend and partially revoke the Trust for her own grandisement, and then to revoke her will for a later will she had and which was admitted to probate, when the purpose and effect of the amendments and revocation were to defeat the scheme of testamentary distribution created in the combination of the Trust **and** the contemporaneously executed mutual wills of Howard and Ida Flint, which formed a **contract**, and when those documents created a unified scheme of testamentary distribution that evidenced an intent that such scheme not be revocable by the sole act of one settlor, because this latter combination of facts are clearly not identical to the first matter.

2. The Chancellor erred in not considering that, contemporaneously with the execution of the Trust, Howard and Ida Flint executed identical mutual wills that simply poured assets over-into the **Trust incorporated into each will and created a contract** so that this fact, coupled with the consideration for the wills, prevented either settlor, by reason of their contract and by his or her sole act, from changing the testamentary disposition provided in the Trust, so that this matter is not identical to his previous holding that Ida had the power to revoke only a Trust A and that another will of hers be **admitted** to probate.

3. The Chancellor erred in not construing the Flint Trust and the identical mutual wills of Howard and Ida Flint as one unified instrument, and by not attempting to reconcile patently inconsistent provisions by his holding of a res adjudicata Plea in Bar for a matter that he earlier decided which was wholly not identical.

4. The Chancellor erred in construing his previous final decision in Chancery No. 15055, that Ida Flint had rightly revoked Trust A but not Trust B, and his previous decision in Chancery No. 15886, that the will dated February 17, 1994, offered for probate may be admitted to probate, to be ***res adjudicata*** for accepting the Plea in Bar, when the present issue of the Bill of Complaint For Specific Performance is **not the identical question** as before, but is rather for **enforcement of the contract** created by the two 1988 **identical wills** of Howard and Ida Flint as part of an integrated combination plan **to include the recitation in each will of the *original* Flint Trust** as a receptor for the pour over of each of their estate assets upon death (at least into the remaining Trust B), and as their expression of a unified scheme of testarnemtary distribution.

5. The Chancellor erred by expressly disregarding the issue of the Bill of Complaint For Specific Performance of the integrated plan created by the 1988 **identical wills as a contract** by choosing one element of the combination which was a different question decided previously per se for accepting a Plea in Bar on a res adjudicata.

PETITION FOR A WRIT OF CERTIORARI

The Flints respectfully petition for a writ of certiorari to review the judgement of the Circuit Court of Virginia.

OPINIONS BELOW

The opinions of the trial court respecting a Plea in Bar of res adjudicata was delivered by Decree (App. *infra*, p.3a) and transcribed by the court reporter. The opinions of the Justice Panel and the full Court (upon request for reconsideration) of the Supreme Court of Virginia denying discretionary review were by written orders (App., *infra*, pp. 1a+2a).

JURISDICTION

The decision of the Circuit Court of Virginia was filed March 6, 1998. (App., *infra*, p.3a). The Supreme Court of Virginia denied discretionary review of the Circuit Court's decision on September 15, and November 6, 1998. (App., *infra*, pp.1a+2a) The jurisdiction of the Court is invoked under 28 U.S.C. § 12 57.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND STATEMENT OF MATERIAL PROCEEDINGS IN THE TRIAL COURT

The pleading underlying this appeal of the Plea in Bar is the Bill of Complaint For Specific Performance of the wills contract. The Flints alleged against (Ida Flint and) Eva Davis causes of action for breach of fiduciary duty and conversion, and sought an enforcement of the pair of wills contract (compact) and the scheme of distribution created by the contract.

On July 3, 1997, the Bill of Complaint For Specific Performance of the Wills contract (compact) was filed. An adverse decision on a Plea in Bar of Res Adiudicata that the Trust had been previously decided was made final March 6, 1998. Objection thereto and a Request for Reconsideration was filed, and then a Notice of Appeal, transcripts of Proceedings, and a Notice of Filing of transcript were timely filed to the Supreme Court of Virginia. A decision of "no reversible error" was made for the Petition For Appeal and the Request for Reconsideration by the Supreme Court whereby the Constitutional rights of due process and equal protection have been denied.

B. STATEMENT OF FACTS

There are four separate documents involved in this case — the Flint Trust, the two identical wills, and the Deed of Gift to the Trust of Howard and Ida Flint, each executed on June 4, 1988. These four documents comprise a single integrated plan for the administration of assets during the lives of Howard and Ida and for the distribution of those assets upon the death of the last to die. Factually, it is evident from the documents that the wills are meaningless without the Trust. Except for a bequest of the marital residence, which is a nullity because the residence had previously been donated to the Trust by the Deed of Gift of June 4, 1988, each will bequeaths all of Howard and Ida's respective estates to the trustee under the Trust "to be held in trust under the terms in effect *at my death*." [Emphasis added.] The Trust was incorporated into each will (paragraph C) "as if the entire agreement were set forth herein" so that if the bequest as initially stated proved ineffective, then the bequest was to the trustee with the assets to be distributed in accordance with the **Trust as incorporated, unrevoked**. So the wills were simply a contract and vehicles by which assets not already a part of the Trust would be poured into it. Likewise, although the inter vivos Trust was funded by a Deed of Gift of their farm and came into effect upon execution, it was ineffective as a testamentary vehicle without the wills to carry out the transfers after death. Accordingly, the Trust and the two wills as a **contract** must be read together and considered as one document. Since the issue before the Chancellor was to determine the intent of Howard and Ida Flint, we must here recite those factual aspects of the intent, as evidenced by the documents, about which there can be no dispute.

Howard and Ida were married for over 45 years. They had no children with each other, but Howard had two sons from

a prior marriage and Ida had relatives in Kansas. We know how they intended that their assets be distributed after both were deceased—the Trust provides that after a charitable bequest, one-half is to go to Howard's two sons, and one-half to Ida's relatives. That intent did not change prior to Howard's death on December 12,1988—the Trust had not been amended, its provisions and the wills were exactly the same as they were the day they were executed. It goes without saying that the joint intent of the settlers could not change after Howard's death. In Article I (B) of his will (App., *infra*, pp. 31a), Howard makes this intent express:

> I give the residue of my real and personal estate to the Trustees under a Joint Living Revocable Trust Agreement made by me and my wife dated June 4,1988, to be held in trust *under the terms in effect at my death*. [Emphasis added].

Ida's will contains an identical provision.

The Deed of Gift, signed June 4, 1988, funded the Flint Trust and was the consideration by Howard and Ida of each to the other which complemented their respective identical wills as a contract with each other for their respective half of their estate to their respective heirs. The assets of each of their estate halves poured over into the Trust by the identical terms in each will upon their respective deaths, as permitted by Virginia Code 64-73 (see paragraphs A, C, D, and E), whereby the beneficiary of a will can be the Trustee of a trust. Ida's amendments to the trust and her revocation of her 1988 will (which formed part of their contract) with a new will were all done after Howard's death and before her own death August 3, 1994, at the age of 96. Ida revoked trust A, but not the maximally funded,

irrevocable, bypass trust B, and made her new will in February, 1994, thereby effectively eliminating Howard's two sons, the Petitioners/Appellants, as beneficiaries, and thus breaching her mutual contract (created by the 1988 pair of wills). Howard died December 12, 1988, having been totally blind for his last three years, and there being no amendments to the two 1988 wills or the trust prior to or at the time of Howard's death by him or his wife.

C. THE LAWSUIT

A Bill of Complaint For Specific Performance was filed July 3, 1997, by the attorney, Spencer D. Ault, for Mr. Flint's two sons. The pleading was amended September 18, 1997, with the approval and recommendation of the Court. The Bill, originally, and as amended and argued, has always been to establish that there was a contract (therein called compact or agreement) by J. Howard Flint and his wife, Ida L. Flint, on June 4, 1988, and that this mutual contract was breached by Ida when she signed her February 1994 will and thus revoked her June 4, 1988 will. In Virginia, such a contract was epitomized by the decision in *Williams v. Williams* 123 Va. 643 (1918), 96 S.E. 749 and a long line of similar decisions thereafter. Ida's 1994 will was **admitted** to probate by the Probate Court's October 28, 1994, Decree (last paragraph) in Case No. 15886 (App., *infra*, p.26a), and in accordance with the limitations of Virginia Code Sect. 64.1-75 and sub-Sect.-80 and decisions, such as *Smith v. Mustian*, 217 Va. 980, 234 S.E. 2d 292; *Tyson v. Scott*, 116 Va. 243, 81 S.E. 57 (1914); *Eyber v. Dominion National Bank* 249 F. Supp. 531 (W.D. Va. 1966); *Eason v. Eason*, 204 Va. 347 (1963), 131 S.E. 2d 280, that it was a will of Ida Flint. In the decision in *Timberlake v. State Planters Bank*, 201 Va. 950, 115 S.E. 2d 39, it was held an earlier will than one already

submitted to probate can also be submitted to probate. Multiple wills can be submitted, *Tate v. Chumbley*, 190 Va. 480, 57 S.E. 2d 151 (1950).

A Plea in Bar was lodged against this current Bill issue to specifically enforce the contract, viz. that basically the Flint Trust revocation had been decided in Chancery No. 15055 previously, the Trust being the receptive entity for the "pour-over" in paragraphs B and C of both of the two Flint 1988 wills, which formed the contract. The Circuit Court in its Final Decree of March 6, 1998, (App., *infra*, p.3a) held essentially that the Flint Trust [A] had been previously held revoked by Ida in sustaining the Plea in Bar. This Petition for a Writ of Certiorari is from this erroneous holding for the Plea in Bar, and the decisions of the Virginia Supreme Court of "no reversible error" (App., *infra*, pp.1a+2a).

However, the decision of revocation of the trust in Chancery No. 15055 was only insofar as the part called trust A. Trust B, the bypass trust, was recited in the trust document to be irrevocable, and was so considered. Thus, the res of the estate of Ida could pour over into the remainder of the Flint Trust (B) (note Virginia Code, Sect. 64.1-73, paragraphs A, C, and E). Ida's revocation of her 1988 will in 1994 is a clear breach of the contract between her husband and herself on June 4, 1988, not having been amended by the two prior to the death of Howard on December 12, 1988. As only one party of the contract, Ida could not properly revoke her will and therefore she breached the contract, and thus her 1994 will and its revocation are a nullity. See the decision in re *Will of Bentley*, 175 Va. 456 (463), 9 S.E. 2d 308 (1940). Their division of property was the result of a mutual agreement between the co-testators which at the death of Howard became fully executed on his part and irrevocable by the survivor, Ida, and the devise of their property was a sufficient consideration.

D. THE APPELLATE DECISION

The Flints appealed on the ground that the Circuit Court's acceptance of a Plea in Bar for the reasons of a res adjudicata that the identical question presented by the Bill of Complaint For Specific Performance of enforcement of a contract (compact) created by two simultaneously executed identical wills (except for gender) (App., *infra*, pp. 26a+31a) of husband and wife, J. Howard Flint and Ida L. Flint, and having consideration, which were a part of an integrated combination plan to include the recitation of the original (unrevoked) Flint inter vivos Trust as a receptor of any remainder in their respective estates and as a vehicle of expression for the distribution of their respective assets upon the death of the last of the two to die, was **not** the identical issue decided by the Chancellor of the Circuit Court in an earlier case 15055 exclusively for the issue that the survivor, Ida Flint had the power to revoke the trust A but not the irrevocable trust B of the Flint Trust, and did, after her husband's death, and in another earlier case 15886 (App.,*infra*, p.22a) he decided that another will, made by Ida Flint subsequent to her earlier will of the contract of the identical two wills after her husband's death and a mere 6 months before her own death at age 96, may be **admitted** to probate and therefore also comprised an identical issue with that sought by the Bill of Complaint For Specific Performance, stated supra. These two issues were not identical by any stretch and the res adjudicata was improper. But the Virginia Supreme Court 3 Justice panel denied the Petition for Certiorari, (App.,*infra*, p.2a) whereupon Reconsideration was requested (before the whole Court), (App.,*infra*, p.1a) which also denied the reconsideration — in both instances merely issuing the same reason of "denied for no revisable error." It is a known fact that the Vir-

ginia Supreme Court takes only a very small percentage of Petitions because of their work load, not because the lower courts are mostly right. This, then, denies equal protection and due process, as guaranteed by the 14th Amendment to the U.S. Constitution, and which had been asserted in the Circuit Court below and in the Petitions to the Virginia Supreme Court. The reason that the matter of the pair of identical wills contract was not and could not be earlier presented is because the Chancellor in the Circuit Court refused to allow Ida Flint to be deposed for questioning before she removed herself from Virginia to Kansas some 14 months before her death and after litigation began, because she and her attorneys would not divulge fully her simultaneously executed will or any knowledge of a subsequent will until time of submission to Probate after her death, some 17 months after litigation began and the earlier will (and then only a purported copy) was not available until long after the probate time —and to this date they have never submitted the original of the earlier will of the compact —as an example of the legal games and deceit respondents have created, and because in Respondent's response to the Petition for Certirori to the Virginia Supreme Court in 15055 they stated that the issue of the wills contract (with or without the Trust incorporated into the respective 1988 wills) was never raised in the court below and therefore it was inproper for Judge Horne in the lower Court to later apply in this case 17813 the res adjadacata issue.

E. ARGUMENT

The issue placed by the Flints is whether Howard and Ida *intended* that one of them, by his or her sole act, could upset the scheme of testamentary disposition set out in the pair of identical wills and Trust. Whether Ida could revoke trust A,

or whether after Howard's death Ida could amend the Trust are not the ultimate questions—they are subsets of the "intent" at issue. While they must be addressed separately, each is but one of several factors to consider in reaching a decision on whether Ida could completely change the testamentary disposition **as a whole** upon which she and Howard had agreed and which remained in effect, unmodified, until after Howard's death. In rendering his decision, the Chancellor made a fundamental error—he considered various portions of the document in a vacuum as if each formed a discrete little packet of intent, rather than drawing conclusions from the integrated instrument (composed of four separate documents) read **as a whole**.

Judge Horne explained orally his decision, in 15055, without regard to VA Code 64.1-67.2, paragraphs A and C with respect to a Settlor/ Trustee with a dual interest being prevented from such action as she did, *viz.*, that Ida had the unrestrained power to revoke the Trust subsequent to the death of her husband, as follows:

> ...the only reasonable, rational way that one can read this document is the way in which there is a Trust A and a Trust B and that during her lifetime, Mrs. Flint, being the survivor, had the right to amend or revoke Trust A, *but not Trust B*. That is the only reasonable, rational way that one can read this document [emphasis added].

Transcript, January 11, 1996, p. 45.

Virginia recognizes the doctrine that mutual identical wills may create a contract between parties that prevents revocation after one dies:

> In short, parties may agree between themselves to execute mutual and reciprocal wills, which, though remaining revocable in a sense, become, upon the death of one, fixed obligations of which

> equity will assume the enforcement on an ultimate beneficiaries behalf (having no full remedy at law) if the survivor attempts to impair them.

Williams v. Williams, 123 Va. 643, 648-49, 96 SE 749 (1918). This principle is not some arcane quirk of Virginia law, but is generally recognized throughout the country. See, for example, *Alvarez v. Coleman* 642 So.2d 361 (Miss. 1994), cited to the Chancellor.

There is no question that here consideration exists for the identical wills. Howard and Ida combined all of their separate assets and conveyed them into the Trust. They expressly provided that, regardless of what the percentage of ownership would be if the original source or title were considered, each would be considered to have contributed one-half of the total assets. In order to make this abundantly clear, they went on to say that to the extent one may have contributed more than the other, the difference would be considered a completed gift. So each had equal shares and the ultimate disposition of those equal shares was to pass equally down family lines. The scheme of testamentary disposition upon the death of both was set out in the Trust — the wills incorporated the Trust and specified that assets would be distributed as provided in the Trust **as incorporated unrevoked (see paragraph C)**. Finally, each will contained the direction that upon the death of the testator, assets would "be held *in trust under the terms in effect at my death*", a clear intent that upon the death of the first to die, the scheme of testamentary disposition would be frozen because of this contract and could not be amended.

Howard and Ida's overall plan for lifetime and testamentary administration and disposition of their pooled assets was both sophisticated and logical. They combined their assets and deposited substantially all of them into the Trust. Regard-

less of the source or original ownership of the assets, Howard and Ida were deemed to have each contributed one-half, and the Trust was divided into two equal shares.

There are established rules of law that govern wills, that govern revocable inter vivos trusts which have no testamentary aspects, and that govern testamentary trusts created by will. In the case of a "normal" will, there is no issue of revocability when the will takes effect; i.e., after the death of the testator. However, the law recognizes that there may be a contract to make a will enforceable in equity, and there may be contracts created by identical, mutual wills that would prevent a *survivor* from revoking his or her will after the death of the first to die. Similarly, in the case of a "normal" testamentary trust, there is no issue of revocability. However, the now popular device, from the great amount of advertizing by specialists of the Bar and others in this area, of creating an integrated lifetime/testamentary plan for two individuals by use of a revocable inter vivos trust is common, but coupled with identical, mutual wills forming a contract is a hybrid of the "traditional" context in which trusts and wills are interpreted, because the trust continues after the death of the first settlor to die. Since the trust was revocable during the lifetime of both settlers, its continuation raises the issue of whether it is revocable after the death of one of the settlers. This Court has not yet addressed how the various rules of law established with respect to the "traditional" instruments, all of which are applicable to some extent to this new hybrid, *combine* to govern the conduct of a surviving settlor-testator and the rights of the beneficiaries of the Trust (and wills).

REASONS FOR GRANTING THE WRIT

Because of the increasing popularity of this device and

the practical fact that, regardless of how carefully drawn, no instrument can anticipate and address every question of "intent" that might arise, and because increased future litigation in this area can be expected, it is important that this Court provide definitive guidance in this matter as well as that to be held a res adjudacata, the same previously decided issue must be present again, which is here not the case.

I. When two sets of issue facts are not truly and fairly the same, identical issue to constitute a res adjudicata between a later set and an earlier decided set, and a State Supreme Court on a Petition for a Writ of Certiorari and Request for Reconsideration holds "no reversible error", not because they can agree they are the same issue decided below but merely because they pick and choose what to them are "important monumental", great issues to decide with their heavy case load and with the same number of justices today in a vastly increased populated State producing more appeals than even 100 years ago in a then much less populated State, justice is not served, and especially to the ordinary individual when the local politics and inept climate of the local Courtroom do not produce honest fairness and thus at both levels this violates ones rights of Constitutional due process and equal protection under the 14th Amendment. The same problem of a sort exists at the highest level of the United States Supreme Court with Petitions for a Writ of Certiorari. Unless ones life is at stake, or the issue involves a big corporation, or a Federal Agency, whereby the issues are "monumental", how does the ordinary man who truly has been served an injustice below and been denied his due process and equal protection in a State, given the extreme heavy case load constantly before the U.S. Supreme Court (of still 9 Justices) and among other criteria "the rule of four" to accept, obtain his 14th Amendment rights of "due pro-

cess" and "equal protection"? The odds are overwhelming against him under the conditions. This is not fair; this is not justice; this is not "equal protection"! When Petitioners are not lawyers, have never been to law school, and have to contend with totally inept lawyers, "incompetent" as former Chief Justice Berger said, and lawyers who withdraw because of their own agenda and are not capable in a given arena of law, so that a Petitioner winds up pro se, and also has to contend with opposing lawyers sworn to tell the truth when admitted to the Bar who do not tell the truth such that the Chancellor on one occasion admitted to this fact as to his own statements in open court, and the fiduciary, respondent, under oath to tell the whole truth on the witness stand states over and over that she does not and cannot remember her fiduciary duties and fails to carry them out, which matters her attorneys try to minimize, and then where a Petitioner has to contend with the odds of acceptance of a Petition for a Writ of Certiorari is even higher against one because it is based simply on discretionary review (and not merely because of agreement of the decision below), this is not "due process" or "equal protection" as our Constitution is taught to us as children in school, as Boy Scouts, or itself guarantees to all of us, or even expounded to all by recent judiciary committee hearings and debate by the U.S. House of Representatives. These statements are made and must be taken in the light of the issue presented herewith that the Circuit Court below very blatantly misconstrued previous decisions and Decrees to fabricate a sameness to the underlying very different Bill for Specific Performance of this case to make the absurd res adjudicata holding. I was especially brought up from childhood to believe in the Constitutionality of "due process" and "equal protection" because J. Howard Flint (Sr.), my father and settlor/testator in this matter, was admitted, and deemed it a high honor, to practice before the Supreme Court of the United States

of America some 66 years ago; it is his legacy which has been stolen. For these reasons I request this Petition for Writ of Certiorari be accepted to really demonstrate our system in this U.S of A. works, and is not simply a discretionary lack of "due process" review.

II. When the decision expressed in the Final Decree by the Chancellor of the Circuit Court for Chancery No. 15055 was made, (App., *infra*, p.11a) it was only inclusive of Ida Flint's revocation of Trust A, but not Trust B, which thus remains, whereby there was no expression of matters concerning the two identical wills forming the contract between Howard and Ida Flint nor of those two wills being a part of an integrated document combination with the Trust recited in each of the wills (App., *infra*, p.26a+31a), to therefore support the decision of the Chancellor on March 6, 1998 in this Chancery No. 17813 (App.,*infra*, p.3a) that he had previously decided this present issue of the wills contract which includes the integrated combination so as to be a **res adjudicata** for the acceptance of the Plea in Bar, the issue for this appeal, and is thereby obviously contrary to what is res adjudicata in Virginia and in the United States as exemplified by the decisions in Eason v. Eason, 204 Va. 347, 131 S.E. 2d 280; Tate v. Chumbley, 190 Va. 480, 57 S.E. 2d 151; Bates v. Devers, 214 Va. 667, 202 S.E. 2nd 917 (1974),viz. the identical question presented before must have been at issue, and it was not here.

While the singular issue for this appeal is the Plea in Bar because of the decision by the Circuit Court alleging Res Adjudicata by its own previous decision in Chancery No. 15055 solely to the revocation of trust A "but not trust B" of the Flint Trust in disguise that the Trust was previously decided as being revoked, when indeed trust B was not and remains and is ca-

pable of receiving the pour over of Ida's estate from her (1988) will, the **whole** of the scheme of Testamentary disposition created by the **combination** of four documents has been presented to give meaning to the central issue and understanding as to difficulty the Flints have had with their extended litigation over five and one-half years from the continuing errors by the Court as described, taken with the confusion created by the Appellees from their secrecy of not disclosing Ida's wills nor permitting her deposition for over two years, their convoluted statements of half truths, their breaches of fiduciary duties, "old-boy" cronyism, and a host of other difficulties in trying to seek judicial **equal protection and due process** under the law and the U.S. Constitution, 14th Amendment.

This appeal from the Final Decree of the Circuit Court of Loudoun County, Virginia, and the denial of the Petition and Request for Reconsideration to the Supreme Court of Virginia regarding a Plea in Bar of Res Adjudicata, is about a pair of identical, mutual wills (except for gender) which were signed by both J. Howard Flint, Esq. (admitted to practice before the Supreme Court of the United States) and his wife, Ida L. Flint, on June 4, 1988, near Round Hill, Virginia. Each will poured over into the Flint Revocable Living Trust, (also signed by both on June 4, 1988), upon the death of the respective testator. Virginia Code Sect. 64.1-73 permits the beneficiary of a will to be the Trustee of a trust (see, for example, paragraphs A, C, D, and E).

Howard died December 12, 1988, there being no amendments to the two wills or to the Trust prior to or at the time of Howard's death by him or his wife. Ida Flint died August 3, 1994, at age 96.

The Circuit Court decision by Judge Thomas Horne on March 6, 1998, with respect to the Flint Trust revocation having been previously decided as a basis for sustaining the Plea

in Bar, is in error because that fact not withstanding the Flint Trust (B) is still in existence to receive the res of Ida's estate since Judge Horne's own decision in No. 15055 (previously quoted) stated "but not trust B" and thus there was no right by Ida to revoke trust B since it was recited as being irrevocable, and because her 1994 will, being a breach of her contract with her husband, Howard, is a nullity. The Court had earlier held that trust A was revoked, not trust B because trust B was recited as being irrevocable and was so held, but trust B was also held under funded on two counts. During a discussion on January 9, 1998 (which is in the transcript, pages 28-34), the Court seems confused and/or deliberately tried to derail and confuse the issue because in Chancery No. 15055, the Court's Final Decree only construed that trust A in *one document* was revoked, and did not in anyway construe more than one document, as it states to the contrary on page 27, line 1; page 28, lines 19 and 20; and page 29, lines 12 and 18, and especially did *not* construe any *will -1988* or 1994 - or **any combination** of them with the Flint Trust, A or B, despite the Court's allegations, page 30, line 21(in the transcript)! That trust A could be changed does not negate the existence still of trust B, into which the estate from the will can pour over to. Certainly appellee's Plea in Bar does not specifically indicate that trust B was deemed revoked (since it was not) nor does it plead that any consideration by the court in No. 15055 was decided in its Final Decree therein that the will contract issue was considered or decided per se or in any combination with a revocation of the Trust, especially trust A (deemed revocable) to sustain a Res Adjudicata. The *identical* question or cause of action presented before must be the same as at issue here now and not on a different claim. The issue now is **not** the same issue decided before and the prior record of litigation does not reflect it to be the same issue. See *Eason v. Eason* 204 Va. 340 (1963), 131 S.E. 2d 280;

Bates v. Devers, 214 Va. 667, 202 S.E. 2nd 917 (1974); *Tate et al v. Chumbley et al*, 190 Va. 480, 57 S.E. 2d 151 (1950); *Hart et al v. Darter et al*, 107 Va. 310, 56 S. E. 190. This Flint situation of a pair of identical wills, trust or not includable, does not negate its similarity to the *Williams v. Williams* case doctrine.

The Bill for Specific Performance originally, and as amended, has always been for the enforcement of this contract (compact or agreement) in opposition to the breachment thereof by Ida by means of her 1994 will. The previous *decision* in 15055 in regards to the revocation of the Flint Trust as a basis for a res adjudicata in support of the Plea in Bar is irrelevant since the *whole* trust was not revoked, to wit, trust B remained unrevoked, so that the 1988 wills can pour over into it, and since such *decision* **did not consider such revocation in conjunction with the contract** (see *Eyber v. Dominion National Bank*, 249 Fed. Supp. 531 (W.D. Va.1966), and Respondent made a special issue in her Reply Brief to the Petition to the Virginia Supreme Court of 15055, regarding the Trust revocation, that no contract or combination with the Trust was decided by the Circuit Court Below whereby the Res Adjudicata is not supported by such a different cause of action now from that before, and was inproper by Judge Horne.

The Court's erroneous decision in this case regarding an unfair, irrelevant and unfounded Res Adjudicata Plea in Bar to prevent the proceeding to establish the contract from the pair of wills which has been breached will leave an adverse affect for the future in this arena, whereas acceptance of this Petition for a Writ of Certiorari to the Supreme Court of the United States would not only serve to right a wrong of a lack of due process and equal protection of rights granted in the U.S. Constitution, but reinforce and make clear that sort of contract situation, somewhat uniquely different, and the issue of a proper res adjudicata (not present here), are to be construed and en-

forced in Virginia and in the United States of America to clarify matters. A rouse by an untrue issue that the *whole* Flint Trust was previously held decided to be revoked or that the will contract itself or in combination with the Trust as a basis for such a Plea in Bar, when it was only (erroneously) trust A so held to be revoked by Ida, and when trust B was not revoked, nor anything to do with the contract of the wills in *combination* with the Trust was ever decided, is the height of deception and error and distortion and an injustice by ignoring the Flints' right of due process and equal protection.

This Court in various previous decisions has frequently stated with respect to the Due Process clause and Equal Protection clause of the Fourteenth Amendment, that the Due Process clause imposed the obligation to administer justice, that the infliction of any improper holdingsso plainly arbitrary and oppressive [here an absured holding of res adjudacata] is to be without due process of law so that neither reason nor justice suggests that to punish a person because he has done what the law planly allows him to do is a due process violation of the most basic sort, and for an agent of a State to persue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional. The decisions of the Virginia Supreme Court affirming res adjudacata in this case flagrantly violates this long settledprinciple of due process and violates the principles of fundamental fairness embodied in the due process clause and cannot stand due process analysis or equal protection to all. The petition for a writ of certiorari should be granted and this callous discretionary practice by all the courts of last resort resolved.

CONCLUSION

It makes no sense at all to conclude that Howard and

Ida Flint's overriding intent was to prevent either of them, by his or her sole act, from affecting the rights of the beneficiaries while both settlers *were still alive* (and there can be no question that the Trust unambiguously prevents that from occurring), but that upon the death of one of them, the other can immediately destroy the rights of some or all of the beneficiaries. The Flints do not contend that upon the death of the last of the settlers to die, the beneficiaries have a right to assets of any specific value. Clearly, a surviving settlor is able to use Trust assets during his or her life. What they do contend is that the *pooled* assets that remain after the death of the last to die, wherever they are located and however they are held must be distributed in the manner provided by the Trust as a **testamentary** trust each of their identical **[wills]**, as at **paragraph C unrevoked**, which formed a **contract**, unchanged as of the date of death of the first settlor to die. They further contend and that this combination, and the pair of 1988 wills themselves, were not previously decided in the earlier Chancery No. 15055, as Respondents Reply Brief to the Petition to the Virginia Supreme Court in 15055 asserted, (also see the objection — pp. 4+5 thereforward — attached to the Final Decree in this case 17813 of March 6, 1998, App., *infra*, p. 7a+), **nor can now be res adjudicata here**, to produce unfairly untrue, legalistic road blocks to prevent a decision on the real issue of the lawsuit whereby to deny them their Constitutional rights of equal protection and due process of the 14th Amendment.

Accordingly, the Flints pray as follow:

1. That this Court decree that Ida Flint's actions to the **combination** of the Trust and identical wills contract are not barred from consideration now by the previous decision of the Chancellor regarding the trust A only to be res adjudicata to support the Chancellor's current decision in support of a Plea in Bar; that Ida's actions which changed the scheme of testa-

mentary distribution as it existed on the date of Howard Flint's death are void and ineffective; that all assets purportedly owned by Ida Flint on the date of her death must be distributed in accordance with the scheme of distribution set out in the Original Trust; that these events with respect to the final decision in Chancery No. 15055, (simply that Ida could and did revoke trust A of the Flint Trust "but not trust B," which decision obviously did not include any thought to the pair of wills of Howard and Ida executed in 1988, as the Trustee/Executrix has admitted (supra), and comprised a contract between themselves in a unique, combined manner of the respective wills pouring over the estate of each into the Trust (B) at their deaths), were not a proper issue, because of the admission to be decided adversely in this Chancery No. 17813 and is thereby **not a proper res adjudicata** issue therein that can support the Plea in Bar herein appealed; and that this cause be remanded to the trial court for further proceedings to carry into effect this judgment; or, in the alternative, that this Court render a reversal of the Circuit Court's Final Decree of the Plea in Bar for the reasons stated because there is admittedly a different issue or cause previously than now alleged for then and now, because there now is indeed a proper contract from the pair of 1988 Flint wills, the 1994 will of Ida Flint being a nullity, and because the Chancellor's lack of previous consideration of the total, overall issues concerning the wills contract and the pouring over by each will into the Trust (even if it is only trust B) as herein above presented and admitted by the Trustee/Executrix does not support his holding of the Plea in Bar, whereby the Flints have indeed been denied unfairly equal protection and due process by these events under the 14th Amendment.

2. That this Court consider this Petition For Writ of Certiorari because of the clear error by the Court of the State of Virginia as to what is res adjudicata in Virginia and the United

States of America for the Plea in Bar, which error is truly a violation of the rights of constitutional due process and equal protection of the Flint brothers, and because the underlying issue of a unique and new combination of a pair of identical wills as a contract having consideration that fully incorporated the simultaneously executed *original* Trust as the means of specifying the intended scheme for distribution of their pooled assets is not fairly the same issues as previously decided in earlier decisions to constitute a res adjudicata here or a holding by the Supreme Court of Virginia of "no reversible error."

Review of the opposition Brief to the Virginia Supreme Court manifests that it is essentially smoke, filled full with untruths and convolutions which are contrary to the facts and statute-code and decisional law here cited and applied, e.g. the issue of this matter is not the same subject matter earlier decided as shown above, Carlon Flint did submit his signature to the brief, and for the most part, the cited decisions by appellants as in support of res adjudicata are far more recent and thus more binding than those cited by respondents.

Respectfully submitted,

J. Howard Flint, Jr., et al., pro se
1114 Dead Run Drive
McLean, VA 22101
703-356-7453

Carlon S. Flint

Carlon S. Flint, Pro Se

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* November, 1998.

J. Howard Flint, Jr., et al.,

Appellants,

against Record No. 981112
Circuit Court No. 17813

Eva L. Davis, Executrix, etc., et al.,

Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 15th day of September, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:
/s/David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 15th *day of* September, 1998

J. Howard Flint, Jr., et al., Appellants,

against Record No. 981112
Circuit Court No. 17813

Eva L. Davis, Executrix, etc., et al., Appellees.

From the Circuit Court of Loudoun County

Upon review of the record in this case and consideration of the argument submitted in suport of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition of appeal.

A Copy,

Teste:
David B. Beach, Clerk

By: /s/Jennifer G. Earl
Deputy Clerk

VIRGINIA:
IN THE CIRCUIT COURT OF LOUDOUN COUNTY

J. HOWARD FLINT, JR.,	)	
and	)	
CARLON S. FLINT	)	
Complainants	)	
	)	
V.	)	In Chancery No. 17813
	)	
EVA L. DAVIS, Executrix	)	
of the Estate of IDA L. FLINT	)	
Respondent		

FINAL DECREE

THIS MATTER CAME before this Court on the Amended Bill of Complaint, Plea in Bar, and Decree certifying into the record of this case the documents from Chancery Nos. 15055 and 15886 submitted with Respondent's Motion to Certify Records, and

IT APPEARING THAT the Court issued its opinion letter in this matter dated February 2, 1998, which letter is hereby incorporated as if fully set out herein, and

IT APPEARING FURTHER THAT Complainants have asserted that J. Howard Flint, Sr. and Ida L. Flint entered into a testamentary compact which included reciprocal wills, a revocable living trust, and a deed of property into the will compact, and

IT FURTHER APPEARING THAT both J. Howard Flint, Sr. and Ida L. Flint are deceased, and-Complainants seek to spe-

cifically enforce the will compact and to establish a constructive trust upon the estate of Ida L. Flint, and

IT FURTHER APPEARING THAT coumsel for the Estate of Ida L. Flint has filed a demurrer and plea in bar to the two count Amended Bill of Complaint, and

IT FURTHER APPEARING THAT the central issue in this matter is the nature of the of testamentary compact which the Complainants seek to enforce, and

IT FURTHER APPEARING THAT this Court has previously interpreted the trust document, included among the documents evidencing the testamentary compact, to have been subject to revocation or amendment by the surviving settlor of the trust, excepting only those provisions relating to the disposition under Trust B, and

IT FURTHER APPEARING THAT the interest of these parties in the Trust has been previously determined in Chancery No. 15055 and

IT FURTHER APPEARING THAT the parties and matters subject to adjudication which were raised or could have been raised in the prior chancery cause are identical to those in the instant case, the only difference being the ability and the effective ability of Ida L. Flint to amend or revoke the trust, it is accordingly

ADJUDGED, ORDERED and DECREED that Respondent's Plea in Bar is SUSTAINED, and this cause is DISMISSED WITH PREJUDICE.

ENTER: /s/Thomas D. Home/
DATE: 6 March 1998

SEEN AND AGREED EXCEPT FOR DENIAL OF ATTORNEY FEES

/s/Daniel D. Smith
Daniel D. Smith, Esquire VSB No. 02857
W. Franklin Pugh, Esquire VSB No. 24973
Jonathan A. Ruybalid, Esquire VSB No. 35212
DANIEL D. SMITH, P.C.
305 Harrison Street, SE
Leesburg, Virginia 20175
703-777-6084
Counsel for the Estate of Ida L. Flint

BY: /S/Fayln Pane/
DEPUTY CLERK

SEEN AND OBJECTED TO PER ATTACHMENT

/s/Spencer D. Ault
Spencer D. Ault, Esquire, VSB No. 23752
JOHNSON, YOUNG & AULT
116-L Edwards Ferry Road NE Leesburg, Virginia 20176
Counsel for Complainants

TWENTIETH JUDICIAL CIRCUIT OF VIRGINIA
(Top of Letter Head with Crest)

February 2, 1998

Spenser D. Ault, Esq.
107 North King Street
Leesburg, Virginia 22075

W. Franklin Pugh, Esq.
305 Harrison Street. S.E.
Leesburg, Virginia 20175

Re: Flint, et. al., v. Estate of Ida L. Flint, deceased,
Chancery No. 17813

Gentlemen:

This matter came before the court on the Amended Bill of Complaint, Plea in Bar, and Decree certifying into the record of this case the documents from Chanery Nos. 15055 and 15886 submitted with complaint's (sic, Respondents) Motion to Certity Records. Complainant's assert that J. Howard Flint, Sr. and Ida L. Flint, entered into a testamentary compact which included reciprocal wills, a revocable living trust, and a deed of property into the will compact. Both J. Howard Flint Sr. and Ida L. Flint are deceased and complaints seek to specifically enforce the will compact and to establish a constructive trust upon the estate of Ida L. Flint.

Counsel for the estate of Ida L. Flint has filed a demurrer and plea in bar to the two count Amended Bill of Complaint. The Court is in agreement with the position taken by the estate, that the central issue is the nature of the testamentary compact which the complainants seek to enforce. This Court has previously interpreted the trust document, included among the docu-

ments evidencing the testamentary compact, to have been subject to revocation or amendment by the surviving settlor of the trust excepting only those provisions relating to the disposition under Trust B. The interest of these parties in the Trust has been previously determined in Chancery No. 15055.

Defendant asserts that the parties and matters subject to adjudication which were raised or could have been raised in the prior chancery cause are identical to those in the instant case. She asserts the only difference is that between the ability and the effective ability of the trustee to amend or revoke the trust. The Court finds itself in agreement with the position of the defendant. Accordingly, the Court will sustain the Plea in Bar and Dismiss this cause with prejudice. Mr. Pugh may draw a Final Decree consistent with this opinion to which Mr. Ault may note his exception.

Very truly yours,
/s/Thomas D. Horn
Thomas D. Horne

ATTACHMENT AS OBJECTION

In Chancery No. 17813

Judge Horne's Letter of opinion under date of February 2, 1998, in the last paragraph begins the first and second sentence thereof by stating "Defendant asserts that..." and "She asserts..." [Eva Davis, the "Executrix"] the several ensuing matters there stated, whereby there is deemed to be a significant difference between someone asserting something and a direct statement of such as a fact, as the Final Decree says.

Judge Horne's said Letter of opinion is in error in his first paragraph, line 5, and hence the Final Decree also, by stating J. Howard Flint, Sr. and Ida Flint [in June 1988] entered "a deed of property into the will compact" since it was in fact into

the inter vivos Trust signed that same day. Judge Horne's second paragraph of his said letter in his statement of the central issue, last sentence, and hence the Final Decree also, is incomplete and thus in error because Complainants' position as to the testamentary compact was not at issue as such specifically previously in the probate matter of Chancery No. 15886 wherein there the only issue decided in the Decree dated October 28, 1994, and indeed that could be decided by the Probate Court in accordance with Virginia statute 64.1-75, citing Tyson v. Scott, 116 Va. 243; Eyber v. Dominion Nat'l Bank, 249 F. Supp. 531 (W.D. Va. 1966) ; and Smith v. Mustian, 217 Va. 980, was "whether the paper admitted to probate is a will and the true last will and testament of the deceased and jurisdiction cannot be extended further and cannot ascertain and enforce rights of property" (and that defendants, J. Howard Flint Jr. and Carlon S. Flint in 15886 had prior to that decision withdrawn any opposition on other matters, see Dillard v. Dillard, 78 Va. 208). Furthermore, Judge Horne's February 2, 1998, letter decision, second paragraph, and the Final Decree also, of central issue is in error as the Complainants' position regarding the compact wills because this was not at issue specifically previously in any manner in Chancery No. 15055, as evidenced by the certified documents therefrom nor is it in the records thereof anywhere, and that the decision in Eason et al v. Eason et al, 204 Va. 347, is on all fours with these matters that nowhere in either of the above Chancerys is the specific issue of the compact wills and/or the testamentary Trust ever raised in the Circuit Court or Probate Court or Equity Court during litigation therein. Indeed, Respondent merely has certified in a particular list of documents and those particular documents per se from 15O55, but in no way has she met her burden to specifically show in said documents where such issues exist. Thus the compact wills issue and the testamentary trust issue cannot be nor

are res adjudicata per said Eason v. Eason decision, supra, and therefore cannot be evidence to sustain the holding of Respondent's Plea in Bar or any demur, the former of which was to be the only issue before the Court. Judge Horne's decision/holding in Chancery No. 15055, and indeed the whole issue there, was with respect to the Settlor/Trustee's right in accordance with the inter vivos Trust document itself only and the Virginia State statute to revoke said Trust (A), excepting Trust B, and whether or not Ida Flint did revoke the inter vivos Trust. Judge Horne's holding in No. 15055 was only that Ida Flint had this right to and did indeed revoke the Flint inter vivos Trust, albeit that his decision was absolutely contrary to Virginia Statute 64.1-67.2, paragraphs A and C, where the Virginia Code verbiage specifically sets forth criteria that was not met by the terms and facts of said inter vivos Trust document nor by Ida Flint which would allow her to revoke said Trust. Said Virginia Code 64.1-67.2 is compatible with Virginia Court decisions and the U.S. I.R.C. , 26 USCS sect. 2041 (b) (1) (A) and footnotes with respect to inclusion or not in a trust of a "special power" to avoid a tax consequence, which the Flint inter vivos Trust implied as an objective in the latter part of articles 15 and 17 (1) and which also exists in both Flint 1988 wills by incorporation therein as a testamentary Trust, being also the essence of Virginia Code 64.1-67.2A and C; and sect. 2056(b) (5) and footnote 6 thereof, especially concerning the presence or not of an "ascertainable standard" and recognition by the IRS that a State law such as Virginia 64.1-67.2 prevails. See also U. Richmond Law Reviews, Vol. 22:759 (764-6) H, and Vol. 25:925 (927-8 & 941) C, including all of footnotes No. 14, 21, 22, and 96, whereas the decision in Chancery No. 15055 is not in accordance with this Virginia statute nor the IRS Code. Indeed Virginia Code 64.1-67.2 is also applicable to wills as well, and this decision of February 2, 1998, and the

Final Decree are not in accordance therewith. Nowhere in the record of Chancery No. 15055, nor any of the several decisions and letters of opinions therein, was there any discussion or issue with regard to a Flint wills compact and/or a testamentary Trust, and thus there can not be any res adjudicata to sustain a Plea in Bar in accordance with the decision in said Eason v. Eason nor Hawkins v. Tampa et al (1955) 197 Va. 22, headnote No. 2, and Tate v. Chumbley, 190 Va. 480. For emphasis, the only decided issue in No. 15055 was regarding the Flint inter vivos Trust; there was no issue and no specific evidence has been presented whatsoever to point to any testamentary Flint trust, which is a whole different matter.

There is no time limit in a probate matter, see Hawkins v. Tampa, 197 Va. 22, nor any direct attack permitted on another will submitted for probate nor is there but a sole means of propounding another will, see the decision in the Will of Bentley, 175 Va. 456, and Eyber v. Dominion Nat'l Bank, 249, F. Supp. 531 (W.D. Va. 1966). In Virginia Code 64.1-73A, and 2, a bequest or device may be made by a will to ... a testamentary Trust.

The decision in the Letter of Opinion of February 2, 1998, and in the Final Decree, are in error further because it states that it appears that this Court "has previously interpreted the trust document", which statement is vague and ambiguous intended to mislead and deceive, whereas in fact the decisions in No. 15055 were only as to the inter vivos Trust document and its amendments, and were never in regards to any testamentary Trust as referred to in either the June 1988 Will of J. Howard Flint, Sr., who was deceased on December 12, 1988, or in the June 1988 Will of Ida Flint, deceased on August 3, 1994 (which two 1988 Wills were validly executed and formed the Wills compact, being identical except for gender, see Williams v. Williams decision, 123 Va. 643 (1918), and ensuing Virginia decisions thereon).

Such a testamentary Trust could and did only occur at the deaths of J. Howard Flint, Sr. and Ida Flint by reason of their respective 1988 wills, and were not in any manner in issue by the Court in decisions in Chancery No. 15055. Respondent has not pointed specifically to any place or item in her certified documents or arguments. Therefore, the instant decision in its several references to the "trust" document, etc. is deceiving, misleading, and inaccurate to deliberately confuse the matter from the truth, wherein the previous decisions in No. 15055 are only in regards to the inter vivos Trust document of June 1988, not to any testamentary Trust created by the 1988 Wills, as for example upon the death of Ida Flint on August 3, 1994, and the real issue here in this Chancery No. 17813, by authority of Virginia Code 64.1-83, as has been orally argued, for which verified court recordings exist to substantiate, and in the written papers submitted in this case and of record in the file, notwithstanding Respondent's counsel's attempt to confuse this trust issue and other issues, is in regard to a testamentary Trust which HAS NOT been previously decided or determined in Chancery No. 15055, and thus the matters are NOT similar or identical in 15055 to this instant No. 17817.

This matter could not have been raised in the prior Chancery cause earlier because it was not ripe earlier since Eva Davis, Executrix, delivered to the Probate Court and attempts to probate a 1994 will of Ida Flint, not even known to Complainants prior to Ida Flint's death, and fails to deliver a 1988 Will of Ida Flint identical (except for gender) to and executed simultaneously with her husband J. Howard Flint, Sr.'s will forming a fixed compact upon the death of J. Howard Flint, Sr. December 12, 1988, and Eva Davis refuses to follow statutory/case law procedures of Virginia in this regard, and since the issue in Chancery No. 15055 and the finding of Trust B thereof (being improperly and under funded) had to proceed first. The issues

in No. 15055 were relevant only to the inter vivos Trust and not relevant to the issues of the estate or 1988 will of Ida Flint, which were not and could not be combined, and further the issues of the estate would have been moot if this Honorable Court would have adjudicated the Trust matter favorable to the Complainants in accordance with Virginia Code 64.1-67.2A and C, which is supported by the IRS code to prevent self -engrandizement of Ida Flint contrary to her agreements and mutual intentions with her husband, J. H. Flint, Sr., up to his death December 12, 1988. Eva Davis, as Trustee and Executrix, has not performed her fiduciary responsibilities in good faith nor to the extent required by Virginia law, requiring the extensive litigation in the order that has become necessary to proceed. This Circuit Court, Probate Court, and Equity Court has not properly followed the Virginia Code and case law, which has necessitated the order of litigation a step at a time.

Indeed Ida Flint could not (because of the 1988 Will compact) and in fact did not amend her validly executed 1988 Will and especially the testamentary Trust, especially as set forth in paragraph B and without question in paragraph C of the June 1988 Will(s), the latter paragraph C reciting all of the original, unamended Flint trust in a testamentary matter (by incorporation), see 64.1-73A, and 2. Ida Flint's various amendments were applicable only to the inter vivos Trust document executed in June of 1988, and were not directed to her validly executed 1988 Will and hence the testamentary Trust created therein at her death, which will could not become "alive" until the time of her death after the time of her amendments. To decisionally construe otherwise is misguided error. Both the Virginia Code 64.1-75 and - 78 footnotes and Virginia Court decisions Tyson v. Scott and Smith v. Mustian, supra, do not permit one to go internally to the details and subject matter within a will in such matters as this by the Court because such matters are only for a

jury to decide (unless waived) , and the fact that a Will compact in June 1988, was indeed validly made in accordance with the Willams v. Williams decision and subsequent similar decisions by the Virginia Courts, which must be followed and adjudicated in a Court of Equity , precludes Ida Flint from making any further valid wills, such as her 1994 will, once J. Howard Flint, Sr. died in December 1988 (having made no changes in matters before he died). The making of her 1994 will is a breach of contract with her husband and is a nullity. This Court is without jurisdiction and authority in its oral statements in Court or in any decision in this case to visit in any way the issue of the compact will, which it did, (being for a jury to decide) or the Williams' decision and such other unrelated issues at this point of time on the issue of the Plea in Bar for the hearing on January 9, 1998, these unrelated comments lacking in jurisdiction serving to demonstrate the prejudice and deliberate attempt by the Court to confuse its decision.

In the Letter of Opinion by the Court dated February 2, 1998, and similarly reiterated in the Final Decree therefore, the Court states that it "has previously interpreted the 'trust' document included among the documents evidencing the 'testamentary' compact to have been subject to revocation or amendment by the surviving settlor...". The Court did no such thing and the record reflects this statement of the Court to be untrue. The Court further states "Defendant's (sic) asserts that the parties and matters subject to adjudication which were raised or could have been raised in the prior Chancery cause are identical to those in the instant case." This statement by the Court is also untrue. Virginia is not under the Unified Code and thus all issues are not required to be nor can be raised when not ripe. These issues between this case and the earlier No. 15055 are very much not identical for the reasons discussed above with respect to inter vivos versus testamentary estate trusts. "She

asserts the only difference is that between the ability and effective ability of the trustee to amend or revoke the trust. [so that] The Court finds itself in agreement with the position of the defendant" to sustain the Plea in Bar on this issue, as the Court continues, as quoted, essentially embodied in the last four (4) paragraphs of the Final Decree.

The Court is totally wrong in its premises, assumptions, and conclusions in these regards. First, the trust litigation and issues in Chancery No. 15055, were strictly concerning matters only to the terms and meanings thereof in the Flint trust inter vivos document signed and effective June 4, 1988, with respect to revocability and amendment thereof by the surviving Settlor/Trustee, as discussed supra. This whole matter was in the Law Court, as prescribed in the Virginia Code for such matters. Second, the instant case, Chancery No. 17813, is an estate matter concerning the request for the Court to enforce a mutual, reciprocal wills compact or agreement under and in accordance with the Williams v. Williams doctrine, 123 Va. 643 (1918) and ensuing similar decisions to this doctrine in a testamentary issue, and as such is in the Equity Court, as prescribed in the Virginia Code for such matters. In Virginia, these two types of court are separate and distinct with two different criteria of consideration, which can not be mixed. An inter vivos Trust is different than a testamentary Trust for reasons as set forth and defined in the Virginia law and decisions. In both of the above, each is different from the other as are apples and oranges, and one can not masquerade as the other. To decide an issue in one, an inter vivos document, can not be an applicable decision in the other, a testamentary document, at a different time, from a different source and totally un-alike (despite the apparent similarities in wording).

In the inter vivos Trust matter of No. 15055, the Court did not combine or bring in the wills, testamentary issues per se nor

especially with respect to the compact or agreement with the two 1988 wills of J. Howard Flint, Sr. and Ida Flint (nor even Ida Flint's 1994 will), and indeed it could not have in any event because the Law Court in the trust issue of No. 15055 did not have the jurisdiction to do so under the Virginia Code and decisions nor was the compact of the Wills and the testamentary Trust ripe for consideration at that time. Conversely, the Equity Court sitting on the instant matter in No. 17813 of the estate, the wills, enforcement of the 1988 will compact or agreement under the Williams v. Williams decisional doctrine, similarly has no jurisdiction under the Virginia Code and decisions (see the verbiage in the Williams decisions itself) to combine or bring in inter vivos trust issues belonging in the Law Court jurisdiction, and especially to mix a decision with an inter vivos trust matter with the entirely different testamentary Trust matter which is as dissimilar as can be in legal affect and terminology because the latter was not and can not be amended in the 1988 will (s) , especially after becoming fixed at the death of J. Howard Flint, Sr., December 1988 and even before the Ida Flint 1988 will came to life only at her death in August 1994. Hence, the testamentary Trust recited in the 1988 will(s), especially at paragraph C, was not born until the death of the testator. Yet this is exactly what the Court in its February 2, 1998 decision and Final Decree has done with disdain for the facts and law - mix together these two different kinds of inter vivos and testamentary Trusts as though they were one in the same and mix together the two different, separate jurisdictions of the Law Court and the Equity Court as though they were one to purposely confuse its decision in its prejudice to support the Respondent.

As before said, Ida Flint's 1994 will is of non-effect, especially coming after the Will compact was fixed at the death of J. H. Flint, Sr., December 1988 and un-amended to that time, and

because decisional law afore cited precludes any regard to the internal, property matters of such a non-effect will and a revocation of a prior will. Moreover, the amendments and revocation by Ida Flint were directed exclusively to the inter vivos Trust document, not any testamentary Trust derived later from a will. So, therefore, the Court's statements, quoted above from its opinion letter of February 2, 1998, and incorporated into the Final Decree are wholly in error and deceptive because this Equity Court (in Virginia) is without jurisdiction to do and decide as it has from a Law Court matter. The Law Court's decision in No. 15055 is not relevant to this testamentary matter of wills and estate in this Equity Court, let alone involving a whole different set of facts, considerations, and conclusions according to decisional and code law. When the Court states it has previously decided or interpreted the (inter vivos) Trust document and papers, which wrongly are supposed to evidence a testamentary compact issue, the Court is wrong, off base, and without jurisdiction to do so. The issues of inter vivos certainly are not the same issues of testamentary, as the Court states Defendant says to which wrongly and in error it agrees; the two can not be mixed legally.

Nowhere in the certified record and papers from No. 15O55 into this case, No. 17813, are there nor has it been specifically stated where therein by Respondent there is any showing of the issues in the decisions let alone discussion, dealing with reciprocal wills and/or testamentary Trust which constitute a wills compact or agreement by the two Flint Testators/Settlors and such issues having been visited in No. 15055. Respondent moved to put such documents into the instant record, No. 17813, but in no wise pointed to where they are; indeed, there are none, which manifests the point in favor of Complainants as an admission against interest by Respondent. Consequently, from the situation discussed, there is indeed no res adjudicata shown

or in fact, the Court's holding erroneously to the contrary, to properly sustain Respondent's Plea in Bar. The Court's decision as stated in it's Letter of Opinion dated February 2, 1998, and similarly reiterated in the Final Decree therefor, being adverse to the Complainants by continuously referring to the trust document or trust with regard to its previous decision in Chancery No. 15055 as evidence of its previously deciding the testamentary issue here in No. 17813 in the present Equit Court, is a deliberate attempt to deceive the issues and to distort the facts to erroneously uphold the Respondent's convoluted mis-statements and support her position, and is a clear violation of Complainants' U.S. Constitutional rights under the 14th Amendment of equal protection and due process of law and under the 14th Amendment of guarantee of such rights in the several States because of the various (and all the) reasons in violation of the Virginia State Code and decisional law, equity, and the applicable IRS Code of the United States of America as cited, as such, as discussed in the decision in First Union National Bank of South Carolina et al v. Cisa et al, 361 S.E. 2d 615 (S.C. 1987). This Court's erroneous, adverse decision of February 2, 1988 and Final Decree based thereon, is not only bad contrary law to the Virginia law, but will create chaos in this area of Trust/Wills compact law in the future because of the extremely heightened popularity over the last decade or two of these types of estate planning instruments from the great amount of advertizing by the specialists of the Bar and others in this area and the general trend from this by the populace to follow these sort of estate planning instruments and the consequent rise in future litigation that is bound to flow from this increasing usage of these sorts of documents. A deliberate, confused, and un-judicial decision of this sort for selfish reasons not only worsens the problems but if properly adjudicated could go a long way to clarify matters for those in the future simi-

larly entangled in such a quagmire.

For the above reasons, at least, the instant Final Decree is objected to.

By: /s/J. Howard Flint, Jr., et al., pro se
1114 Dead Run Drive
McLean, VA 22101

VIRGINIA:
IN THE CIRCUIT COURT OF LOUDOUN COUNTY

J. HOWARD FLINT, JR., et al.	)	
Complainants	)	
	)	
v.	)	In Chancery No. 17813
EVA L. DAVIS, EXECUTRIX, et al.	)	
For the estate of	)	
Ida L. Flint, deceased	)	

Request for Reconsideration

The Complainants, J. Howard Flint, Jr. and Carlon S. Flint, Hereby request reconsideration of the Final Judgement Decree entered on March 6, 1998, for the reason stated in the typed and substituted objections appended to said Decree, a true copy of which is hereby affixed to this request. In response to this request the Court is requested to specifically respond fully to the issue raised with respect to inter vivas trust verses testamentary trust as there argued in conjunction with the cited Virginia Code and decisional law. Also the Court is requested to specifically respond fully to the jurisdictional issue raised with respect to the law Court, Probate Court and Equity Court as argued and in accordance with the Virginia Code and cited decision.

Oral argument before the Court is waived in view of the written request and a written response. It is truly believed that the Court has erred in it's reasoning in the Final Decree and reversal of the Court's decision is requested.

By: /s/Howard Flint, Jr.
J. Howard Flint, Jr., et al., pro se
1114 Dead Run Drive
McLean, VA 22101; 703-356-7453

It is hereby certified that a copy of this request has been sent by first class United States Mail, postage prepaid to appropriate council, Franklen Pugh, 305 Harrison St., SE, Leesburg, VA 20175, this 18th day of March, 1998.

By: /s/J. Howard Flint, Jr.
J. Howard Flint, Jr.

VIGINIA:

IN THE CIRCUIT COURT OF

LOUDOUN COUNTY

J. HOWARD FLINT, JR., et al.	)	
Complainants	)	
	)	
v.	)	In Chancery No. 15055
	)	
EVA L. DAVIS, EXECUTRIX, et al.	)	
Respondents	)	

DECREE

THIS MATTER CAME to be heard on the 9th day of February, 1996, in order to, among other things, argue Complainants' Motion for Reconsideration and to schedule a trial on issues relating to the funding of "Trust B" of the Flint Revocable Living Trust.

NOW THEREFORE, IT IS ORDERED:

That for the reasons stated in the Court's letter opinion of February 20, 1996, Complainants' Motion for Reconsideration is DENIED; and that this matter be set for a trial and an ore tenus hearing

before this Court on issues relating to the funding of "Trust B" of the Flint Revocable Living Trust to be heard April 19, 1996, at 2:00 p.m.

AND THIS MATTER IS CONTINUED.

ENTERED this 4th day of March, 1996

By: /s/Thomas D. Horne
Thomas D. Horne, Judge
Circuit Court of Loudoun County

SEEN AND AGREED

/s/Daniel D. Smith
Daniel D. Smith, Esquire, VSB No. 02857
W. Franklin Pugh, Esquire, VSB No. 24973
Terry L. Lazaron, Esquire, VSB No. 26440
JORDAN COYNE & SAVITS
105 Loudoun Street, SE
Leesburg, VA 22075

Counsel for Respondents

SEEN AND AGREED AND OBJECTED TO

Spencer D.Ault
Spencer D. Ault, Esquire, VSB No. 23752
AULT & STEIN
107 N. King Street
Leesburg, Virginia 22075

Counsel for Complainants

TWENTIETH JUDICIAL CIRCUIT OF VIRGINIA
(Top of Letter Head with Crest)

February 20, 1996

Spenser D. Ault, Esq.
107 North King Street
Leesburg, Virginia 22075

Daniel D. Smith, Esq.
W. Franklin Pugh, Esq.
Terry Lazaron, Esa.
305 Harrison Street, S.E.
Leesburg, Virginia 22075

Gentlemen:

Re: Flint, et. al. v. Davis, Executrix, et. al.,
Chancery No. 15055, Chancery No. 15886

This case is before the Court on the motion of the complainant for reconsideration of its prior ruling with respect to the proper construction to be given the Flint Revocable Living Trust. The Court will deny the Motion for Reconsideration.

The trust document provides that the,

> "... **Settlors, or the survivor of them ... reserve the** right at any time or from time to time ... **to amend or revoke this Trust in whole or in part,** by written instrument signed **by them** and delivered to the Trustee... ."

It is a strained, and unreasonable, *construction of* the document to suggest that the settlors would reserve to the survivor the right to amend or revoke the Trust A only in the event they were able to obtain the assent of their deceased spouse. See, Mills v. Embry, 166 Va. 383 (1936).

As the settlors retained the right to amend or revoke the Trust during their lifetimes, and the survivor to amend or revoke Trust A during his or her lifetime, the Trustee owed no duty to the complainant beneficiaries of Trust A, until the death of the surviving settlor. Any rights of the complainants were enjoyable by them upon the death of the surviving settlor. See, Bickers v. National Bank, Ex'r, 197 Va. 145, 158 (1955) (dissent).

The Motion for Reconsideration is **denied.** In accordance with the prior Decree of this Court of February 9, 1996, the matter will be set for hearing on the issue of the funding of Trust B and whether or not a constructive trust should be imposed upon funds in the estate of Ida Flint.

Very truly yours,
/s/Thomas D. Horne
Thomas D. Horne

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

IN RE: Estate of Ida L. Flint, Deceased CHANCERY NO: 15886

FINAL DECREE

THIS MATTER CAME before this Court October 13, 1994, on the petition of Eva L. Davis to be appointed curator of the Estate of Ida L. Flint, deceased, pending a hearing, scheduled for October 28, 1994, for an order to show cause, pursuant to Virginia Code §64.1-79, why a will, dated February 17, 1994, under which the aforesaid Eva L. Davis is named Executrix, executed by Ida L. Flint (the "Decedent") should not be admitted to probate.

THIS MATTER ALSO CAME before this Court October 28, 1994, 8:00 a.m., on an order to Show Cause, pursuant to Virginia Code §64.1-79, as to why a will, dated February 17, 1994, under which the Eva L. Davis ("Petitioner") is named Executrix, executed by Ida L. Flint (the "Decedent"), should not be admitted to probate.

The following counsel were present on October 13, 1994: Daniel D. Smith and W. Franklin Pugh of Jordan Coyne & Savits, counsel for Eva L. Davis, and John R. Willett and James R. Trice, III, counsel for J. Howard Flint, Jr., Carlon S. Flint, Desiree Flint and Deborah Seal (hereinafter "will opponents") were present. The following parties appeared on October 28: W. Franklin Pugh of Jordan Coyne & Savits, counsel for Eva L. Davis. John R. Willett participated by telephone for the will opponents.

IT APPEARING THAT the aforesaid will opponents, having filed motions objecting to the probate of the Decedent's aforesaid will,
have now withdrawn their objections to said probate, but have objected to the qualification of Eva L. Davis as Executrix there-

under, and

IT FURTHER APPEARING that the Decedent died on August 3, 1994, and that she was a domiciliary of, and owner of a mansion house in, Loudoun County, Virginia, and

IT FURTHER APPEARING that **publication of the order to show** cause why the above- referenced will should not be probated has been made as required under the Virginia Code, and

IT FURTHER APPEARING that Eva L. Davis has offered the above referenced will for probate and requests this Court to appoint and qualify her as Executrix of the Decedent's estate, and

IT FURTHER APPEARING that this matter was called in open court and at the front and rear of the court house, and no other persons or parties appeared to state any reason why the will should not be probated,

NOW THEREFORE, IT IS ORDERED:

1. That the Executrix's authority shall be limited pursuant to a pendente lite decree in Loudoun County Chancery No. 15055 until further resolution or decree in said case, and

3. That this Court finds no reason why the last will and testament dated February 17, 1994, of Ida L. Flint, deceased, may not be admitted to probate by this Court, and

4. That Eva L. Davis, upon appropriate application to the Court or the clerk thereof, may qualify to serve as Execu-

trix of the Estate of Ida L. Flint, and

5. That, the petition for appointment of a curator is DISMISSED.

And this matter is FINAL and CONCLUDED as to the sole issue presented in this procedure, which is whether the paper offered for probate is or is not the will of decedent.

ENTER:/s/Thomas D. Houe

DATE: 28 October 1994

SEEN AND AGREED:
/s/Daniel D. Smith
Daniel D. Smith, Esquire VSB No. 02857
W. Franklin Pugh, Esquire VSB No. 24973
Jordan Coyne & Savits
105 Loudoun Street, SE
Leesburg, VA 22075
703-777-6084
Counsel for Eva L. Davis

SEEN AND _____:

/s/John R. Willet
John R. Willett, Esquire, VSB No. 06317
James R. Trice, III, Esquire, VSB No. 29752
1705 Fern Street, P.O. Box 3098
Alexandria, Virginia 22302

Counsel for Complainants J. Howard Flint, Jr. et al.

Will

of

Ida Louise Flint

I, Ida Louisa Flint, of Loundon County, Virginia, revoke all my prior wills and codicils and make this my will.

I am married to J. Howard Flint ("my husband"). At the time this will is executed, my husband has two children: J. Howard Flint, Jr., and Carlon S. Flint, by a previous marriage.

ARTICLE I
DISTRIBUTION OF ESTATE

A. I give all my interest in my principal residence at my death, including all adjoining real property and related casualty insurance, to my husband if he survives me. This devise includes my interest in any condominium or cooperative residence if it is then my principal residence.

B. I give the rest of my real and personal assets to the trustees under a Joint Living Removable Trust Agreement made by my husband dated June 4, 1988, to be held in trust under the terms in effect at my death. The trust Agreement was originated before this will.

C. In the event for any reason the bequest under Paragraph B immediately preceding is ineffective and invalid, then I give the residue of my real and personal estates to the Trustee or Trustees specified in the Trust Arrangement above referenced and made a part thereof the same as if the entire agreement were set forth herein.

ARTICLE II
DEBTS, TAXES AND OTHER CHARGES

A. My Executrix shall pay or provide for the payment of my legally enforceable debts, my charitable pledges and the expenses of my funeral and burial (including the cost of a monument or marker). My Executrix shall not seek contribution from my husband on our joint debts. However, if my husband wishes to retain any residence or other real property subject to a mortgage or similar indebtedness and so advises my Executrix within six months after my death. My Executrix my elect not to pay the indebtedness.

B. My Executrix shall pay or provide for the payment of all, inheritance and similar taxes payable by reason of my death, including taxes on assets not passing under this will and interest on taxes, but excluding any generation-skipping transfer taxes. The taxes and interest shall be paid as a cost of administering my estate and without apportionment. However, my Executrix shall seek recovery of the taxes and interest paid by my Executrix and attributable to any qualified terminable interest property included in my estates from the person receiving the property.

C. I authorize my Executrix to elect all or a fractional or formula share of my share under the Trust Agreement described in Article 1B qualify for the marital deduction. Any election made by my Executor in good faith shall not be subject to challenge by any person.

ARTICLE III
EXECUTOR

A. I name Eva L. Davis and the First American Bank of Virginia to be my co-Executrixs. If it becomes necessary or advisable, in the discretion of the Executrix, to appoint a co-Executor who is a resident of the sate of Virginia or an administrator for the purpose of ancillary administration, I authorize my Executor to nominate a person or institution to

serve in such capacity. I request what my Executor and my administrator serve with out bond or security.

B. In addition to the powers granted by law, I grant my Executor and administrator the powers set forth in Section 64.1-57 of Code of Virginia, and I incorporate that Code Section in my will by this reference. The term "Executor," as used herein, includes the terms "Executrix" and "co-Executors."

ARTICLE IV
MICELLANIOUES PROVISIONS

A. Where appropriate to the context, pronouns or other terms expressed in one number and gender shall be deemed to include the other number and genders.

B. All payments of principal and income payable, or to become payable, to beneficiary hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of my Executor or Trustee, be liable for, or subject to, the debts, contracts, obligations, liabilities or torts of any beneficiary.

I have signed and sealed my will and initialed or signed each of the 3 typewritten pages on this 4 day of June, 1988.

/s/Ida Louise Flint
(SEAL)
Ida Louise Flint

The testatrix signed, sealed and declared this as her will in our presence on the date shown above. At the testatrix's request we have both signed our names as witnesses. all of this occurred at the same time and we and the testatrix were present together throughout.

/s/Ivan E. Clark of Round Hill

/s/John M. Rankin of Round Hill

STATE OF VIRGINIA

COUNTY OF LOUDOUN, To-wit:

Before me, the undersigned authority, on this date personally appeared Ida Louise Flint, Ivan E. Clark, and John M. Rankin, Jr., known to me to be the testatrix and the witnesses, respectively, whose names are signed to the attached instrument; and all of these persons being by me first duly sworn, Ida Louise Flint, the testatrix, declared to me and to the wittiness in my presence that said instrument is her last will and testament and that she had willingly signed and executed it in the presence of said witnesses as her free and voluntary act for the purposed therein expressed, and said

witnesses seated before me that the foregoing will was executed and acknowledged by the testatrix as her last will and testament in the presence of said witness who, in her presence, and at her request, and in the presence of each other did subscribe their names thereto as attesting witness on the day of the date of said will, and that the testatrix, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

/s/Ida Louise Flint
Ida Louise Flint

/s/Ivan E. Clark o

/s/John M. Rankin

Subscribed, sworn and acknowledged before my by Ida Louise Flint, the testatrix; subscribed and sworn before me by Ivan E. Clark and John M. Rankin, witnesses, this 4 day of June, 1988.

/s/Danel D. Smith
Notary Public

My Commission Expires: September 5, 1989

Will

of

J. Howard Flint

I, J. Howard Flint, of Loundon County, Virginia, revoke all my prior wills and codicils and make this my will.

I am married toIda Louise Flint ("my wife"). At the time this will is executed, I have two children: J. Howard Flint, Jr., and Carlon S. Flint, by a previous marriage.

ARTICLE I
DISTRIBUTION OF ESTATE

A. I give all my interest in my principal residence at my death, including all adjoining real property and related casualty insurance, to my wife if he survives me. This devise includes my interest in any condominium or cooperative residence if it is then my principal residence.

B. I give the rest of my real and personal assets to the trustees under a Joint Living Revocable Trust Agreement made by my wife dated June 4, 1988, to be held in trust under the terms in effect at my death. The trust Agreement was originated before this will.

C. In the event for any reason the bequest under Paragraph B immediately preceding is ineffective and invalid, then I give the residue of my real and personal estates to the Trustee or Trustees specified in the Trust Arrangement above referenced and made a part thereof the same as if the entire agreement were set forth herein.

ARTICLE II
DEBTS, TAXES AND OTHER CHARGES

A. My Executrix shall pay or provide for the payment of my legally enforceable debts, my charitable pledges and the expenses of my funeral and burial (including the cost of a monument or marker). My Executrix shall not seek contribution from my wife on our joint debts. However, if my wife wishes to retain any residence or other real property subject to a mortgage or similar indebtedness and so advises my Executrix within six months after my death. My Executrix my elect not to pay the indebtedness.

B. My Executrix shall pay or provide for the payment of all, inheritance and similar taxes payable by reason of my death, including taxes on assets not passing under this will and interest on taxes, but excluding any generation-skipping transfer taxes. The taxes and interest shall be paid as a cost of administering my estate and without apportionment. However, my Executrix shall seek recovery of the taxes and interest paid by my Executrix and attributable to any qualified terminable interest property included in my estates from the person receiving the property.

C. I authorize my Executrix to elect all or a fractional or formula share of my share under the Trust Agreement described in Article 1B qualify for the marital deduction. Any election made by me Executrix in good faith shall not be subject to challenge by any person.

ARTICLE III
EXECUTRIX

A. I name my wife and Eva L. Davis to be my co-Executrixs. If either my wife Eva L. Davis is unable or unwilling so to serve, then i name as successor co-Executor the First American Bank of Virginia. If it becomes necessary or advisable, in the discretion of the Executrix, to appoint a co-Executor who is a resident of the sate of Virginia or an administrator for the

purpose of ancillary administration, I authorize my Executrix to nominate a person or institution to serve in such capacity. I request what my Executrix and my administrator serve with out bond or surety.

B. In addition to the powers granted by law, I grant my Executrix and administrator the powers set forth in Section 64.1-57 of Code of Virginia, and I incorporate that Code Section in my will by this reference. The term "Executor," as used herein, includes the terms "Executrix" and "co-Executrices."

ARTICLE IV
MICELLANIOUES PROVISIONS

A. Where appropriate to the context, pronouns or other terms expressed in one number and gender shall be deemed to include the other number and genders.

B. All payments of principal and income payable, or to become payable, to beneficiary hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of my Executrix or Trustee, be liable for, or subject to, the debts, contracts, obligations, liabilities or torts of any beneficiary.

I have signed and sealed my will and initialed or signed each of the 3 typewritten pages on this 4 day of June, 1988.

/s/J. Howard Flint
(SEAL)

J. Howard Flint

The testator signed, sealed and declared this as his will in our presence on the date shown above. At the testator's request we have both signed our names as witnesses. all of this occurred at the same time and we and the testator were present together throughout.

/s/Ivan E. Clark of Round Hill

/s/John M. Rankin of Round Hill

STATE OF VIRGINIA

COUNTY OF LOUDOUN, To-wit:

Before me, the undersigned authority, on this date personally appeared J. Howard Flint, Ivan E. Clark, and John M. Rankin, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached instrument; and all of these persons being by me first duly sworn, J. Howard Flint, the testator, declared to me and to the wittiness in my presence that said instrument is his last will and testament and that she had willingly signed and executed it in the presence of said witnesses as his free and voluntary act for the purposed therein expressed, and said witnesses seated before me that the foregoing will was executed and acknowledged by the testatrix as his last will and testament in the presence of said witness

who, in his presence, and at his request, and in the presence of each other did subscribe their names thereto as attesting witness on the day of the date of said will, and that the testatror, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

/s/J. Howard Flint
J. Howard Flint

/s/Ivan E. Clark

/s/John M. Rankin

Subscribed, sworn and acknowledged before my by J. Howard Flint, the testator; subscribed and sworn before me by Ivan E. Clark and John M. Rankin, Jr., witnesses, this 4 day of June, 1988.

/s/Danel D. Smith
Notary Public

My Commission Expires: September 5, 1989

Clerk's Office of the Circuit Court of Loudoun County, to-wit:

March 29, 1989

A paper writing purporting to be the last will and testament of Joseph Howard Flint, deceased, dated June 4, 1988, was this day presented to the Clerk of the Court for probate.

It appearing that Joseph Howard Flint resided at Rt. 1 Box 517, Round Hill, Loudoun County, Virginia, within the jurisdiction of this Court and that Joseph Howard Flint died December 12, 1988, the will consisting of five typewritten pages dated June 4, 1988, having been proven pursuant to Code § 64.1-87.1 is thereupon established and adjudged to be the last will and testament of Joseph Howard Flint, deceased, and is ordered to be recorded as such.

Thereupon Ida L. Flint and Eva L. Davis, the Executors named therein, asked permission to qualify as such, whereupon such permission being granted, Ida L. Flint and Eva L. Davis appeared, made oath as the law directs, and entered into and acknowledged before the Clerk a bond as such Executors in the penalty of Sixteen Thousand Dollars payable and conditioned according to law. No surety required by will.

And certificate is granted Ida L. Flint and Eva L. Davis for obtaining a probate of the said will of Joseph Howard Flint, deceased, in due form.

No appraisement deemed necessary, an inventory to

be filed.

/s/F.R. Howard Clerk

/s/M.William L. Loy Deputy Clerk

Supreme Court, U.S.
FILED
FEB 10 1999
CLERK

No. 98-1098

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

J. HOWARD FLINT, JR.
and
CARLON S. FLINT,

Petitioners,

v.

EVA L. DAVIS,
AS EXECUTRIX OF THE ESTATE OF
IDA L. FLINT
(AND IN OTHER CAPACITIES),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

DANIEL D. SMITH
LAW OFFICES OF
DANIEL D. SMITH, P.C.
305 Harrison Street, S.E.
Third Floor
Leesburg, Virginia 20175
(703) 777-6084

Counsel for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

2048

QUESTION PRESENTED

Is there a substantial question of Federal law affording basis for review by the Supreme Court of the United States involved in a suit in Virginia state court between private parties over an alleged breach of contract involving testamentary documents wherein no error is assigned with respect to a denial of Federal constitutional rights and no assertions with respect thereto were set up in the pleadings in the court below at the Circuit Court level?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari does not accurately list the parties to the proceeding.

The style and caption of the Petition for Writ of Certiorari in this case as filed with the United States Supreme Court lists Carlon S. Flint as a petitioner. However, at the level of the Circuit Court of Loudoun County (Virginia), Carlon S. Flint's legal counsel did not, on his behalf, sign or file a Notice of Appeal with said Court as required by Virginia Supreme Court Rule 5:9(a) and Virginia Code §8.01-271.1. Objection to Carlon S. Flint's status as petitioner is hereby noted.

The style and caption of the Petition for Writ of Certiorari in this case as filed with the United States Supreme Court lists as respondents Eva L. Davis, individually, and in her capacities as Executrix of the Estate of J. Howard Flint and as Co-Trustee of the Flint Revocable Living Trust. However, the Bill of Complaint filed in the Circuit Court of Loudoun County (Virginia) names as Respondent Eva L. Davis only in her capacity as Executrix of the Estate of Ida L. Flint. Objection to the inclusion of Eva L. Davis individually or in any capacity other than Executrix of the Estate of Ida L. Flint is hereby noted. For said reason the term "Respondent" in the singular sense is employed throughout this Brief In Opposition. The proper parties to the case are:

J. Howard Flint, Jr., Petitioner;

Eva L. Davis, Executrix of the Estate of Ida L. Flint, Respondent.

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JURISDICTIONAL STATEMENT

Petitioners seek to invoke the jurisdiction of the Supreme Court of the United States on writ of certiorari pursuant to U.S.C.S. §1257. This statute, set forth below, permits review of the highest court of a State by this Court in three circumstances: (1) Where the validity of Federal law is drawn into question; (2) Where the validity of a State statute is drawn into question on the ground of its repugnance to Federal law or the Constitution; or (3) Where a title, right, privilege, or immunity is specially set up or claimed under the Constitution or Federal law.

None of these circumstances exist in this matter, and this Court does not have jurisdiction over this matter. Although Petitioners now claim that their rights to due process and equal protection under the 14th Amendment to the Constitution have been violated, they did not raise such claims in their pleadings in Circuit Court of Loudoun County (Virginia) or the Supreme Court of Virginia, nor were such claims argued by the parties at any stage, nor are Petitioners specific in their allegations in their instant petition as to how said rights may have been violated in the courts below.

Respondent urges denial of the petition on the basis of lack of jurisdiction of this Court.

STATUTORY JURISDICTIONAL PROVISION AT ISSUE

28 USCS §1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or

statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

A. Procedural Background

The case before the Court on this petition is one of a series of cases waged by Petitioners against Respondent (personally and in fiduciary capacities) initiated in the Circuit Court of Loudoun County (hereinafter the "Circuit Court") with respect to the disposition of the Estate of their father and step-mother J. Howard Flint, Sr., and Ida L. Flint (hereinafter "Mr. Flint" and "Mrs. Flint", respectively) and a series of testamentary documents which Mr. and Mrs. Flint had executed, to wit: Flint Revocable Trust u/t/d June 4, 1988 (hereinafter the "Trust") and wills of the same date. The issue before the Circuit Court, and subsequently before the Virginia Supreme Court on appeal, was whether the rulings on the first case (Loudoun County Chancery No. 15055, Virginia Supreme Court Record No. 962224)[1] raised a bar of prior adjudication to the second (instant) case. The Circuit Court ruled that the issues presented in the instant matter were raised or could have been raised in the first case and were thereby barred from further adjudication.

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[1] This case shall hereinafter be referenced as "Chancery No. 15055" or "the first case."

Petitioners initiated Chancery No. 15055 in 1993 prior to Mrs. Flint's death. She died in 1994 during the course of the litigation and Respondent was substituted as a party in her capacity as Executrix of Mrs. Flint's estate. The primary issue of that case centered on the question of whether Mrs. Flint, as Settlor, retained the right to revoke and amend her share of the Trust (consisting of assets which she contributed and received from her husband) and/or to request disbursement of its principal subsequent to the death of Mr. Flint who had died in 1988. Petitioners had been named beneficiaries of a portion of Mrs. Flint's trust share at one point in time. Upon Mrs. Flint's death, the focus of the primary issue then shifted slightly to encompass the efficacy of trust amendments and a disbursement directive she had executed during her life, the combined effect of which had removed Petitioners as beneficiaries. The Circuit Court correctly ruled that Mrs. Flint had, in fact, retained the right to revoke and amend her share of the Trust, thereby giving effect to the amendments which she had executed during her life. Petitioners' interest under the Trust was litigated and determined in said first case to the effect that they had no interest in Mrs. Flint's share of the Trust. Petitioners filed a Petition for Appeal of the Circuit Court's rulings in that matter, and the Virginia Supreme Court refused said petition on May 29, 1997.

A few weeks later, on July 3, 1997, Petitioners filed the instant matter, asserting that Mr. and Mrs. Flint had entered into a "testamentary compact" which included the Trust, "pour over" wills executed by Mr. and Mrs. Flint on June 4, 1988, and a deed of the same date whereby certain real property was transferred to the Trust. Petitioners asserted that Mrs. Flint breached the "testamentary compact" (1) by requesting (and

receiving) principal distribution from her share of the Trust which the court, in the first case, held she was authorized to execute, (2) by executing the amendments to her share of Trust which the court, in the first case, held she was authorized to execute, and (3) by making a new will in February, 1994 (see Amended Bill of Complaint ¶ 11).

In the Circuit Court, Respondent filed a plea in bar, asserting that the Petitioners' new action was barred by prior adjudication of any and all relevant issues in Loudoun County Chancery No. 15055 and/or an *inter parties* probate matter (Loudoun County Chancery No. 15886) initiated by Respondent pursuant to Virginia Code §64.1-79 to which Petitioners and Respondent had been parties. All of the documents said to comprise the "testamentary compact," as well as the trust amendments and the February, 1994 will, were admitted into evidence in Chancery No. 15055. The instant case deals with the same subject matter as that case, to wit: the disposition of property owned by Mr. and Mrs. Flint upon their deaths. Relevant portions of the records from Chancery Nos. 15055 and 15886 were certified into the instant case. The Circuit Court sustained the plea in bar and dismissed the cause with prejudice. The Virginia Supreme Court refused Petitioners' petition for appeal and a petition for rehearing without opinion.[2]

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[2] As noted in the "Parties to the Proceeding" section of this Brief in Opposition, Carlon S. Flint's legal counsel did not, on his behalf, sign or file a Notice of Appeal with the Circuit Court as required by Virginia Supreme Court Rule 5:9(a) and Virginia Code §8.01-271.1. The Virginia Supreme Court denied the Petition for Appeal without comment as to his status as purported Appellant.

At no point in the pleadings at the Circuit Court level did Petitioners assert that they had been denied due process or equal protection under the Fourteenth Amendment to the United States Constitution (as applied through the Fifth Amendment), nor was such an assertion made in their petition for appeal to the Virginia Supreme Court. Having not been pled, it was never argued by the parties or considered by either level of Virginia court.

B. Statement Of Facts[3]

On June 4, 1988, Mr. and Mrs. Flint, husband and wife for over 40 years, established the Trust, designating Mrs. Flint and Eva L. Davis as Trustees. On that date, Mr. and Mrs. Flint funded the Trust by executing a deed transferring to the Trust their jointly owned 338 acre farm, consisting of four (4) parcels, near Round Hill, Virginia. Mr. and Mrs. Flint also executed "pour over" wills on the same date. Petitioners contend that, in signing these documents, Mr. and Mrs. Flint entered a "testamentary compact."

J. Howard Flint died on December 12, 1988, and his 1988 will was duly probated in the Circuit Court of Loudoun County on March 29, 1989. Pursuant to Trust Article 3B, the assets in Mr. Flint's share of the Trust were distributed fully subsequent to his death. After determining that Mr. Flint's share did not require additional funding under Article 3B2, the Trustees

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[3]The "Statement of Facts" section of Petitioners' Petition (pp. 3-5) is inaccurate, incomplete, misleading, unsupported by the record in the case, and contains a multitude of erroneous conclusions of law. Accordingly, in furtherance of their obligations under Rule 15.2 of the Supreme Court Rules, Respondent is compelled to correct the misstatements of the record.

were directed to follow Article 3B3 by allocating assets to a "by-pass trust" (also known as "Trust B") in an amount equal to his unified tax credit equivalent ($600,-000).[4] Mrs. Flint had the right to receive the income from Trust B, as well as certain rights to access principal, but she had no right to revoke or amend Trust B. The remainder of Mr. Flint's share was allocated and added to Mrs. Flint's share pursuant to Article 3B4. This survivor's share, consisting both of what she contributed and what was added from Mr. Flint's share, became known as Trust A. Loudoun County Chancery No. 15055 confirmed that Mrs. Flint retained the right to revoke and amend Trust A and to request and receive full principal distribution therefrom.

As executed originally in 1988, Article 3C2 of the Trust provided a scheme of distribution whereby, upon the death of the second Settlor to die, the assets of both Trust B and Trust A (the survivor's share) would include distributions to various family members, including Petitioners for 25% each. In years subsequent to Mr. Flint's death, Mrs. Flint contributed additional assets to the corpus of Trust A and executed a series of Trust amendments modifying various provisions of Trust A. The amendments which she executed altered the scheme for distribution of Trust A assets at her death, in the course of which the distributions to Petitioners were eliminated. The Trust amendment which was in effect at the time of her death in August 1994 was the Sixth Amendment to Trust Agreement dated February 17, 1994. This amendment allocated distribution of Trust A's assets to her Executrix upon Mrs. Flint's death. Also

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[4]The funding of Trust B was resolved in an evidentiary hearing in Chancery 15055. That portion of the case was not part of the matter appealed in Supreme Court Record No. 962224.

on February 17, 1994, Ida Flint executed a directive to herself and Eva L. Davis as Trustees whereby she instructed that all assets in Trust A be distributed to her immediately.

When Mrs. Flint died on August 3, 1994, the will which she had in effect was dated February 17, 1994. It provided for a distribution scheme which did not include Petitioners as beneficiaries. Eva L. Davis, named Executrix under said will, petitioned the Circuit Court of Loudoun County in Chancery No. 15886, to issue a summons pursuant to Virginia Code §64.1-79 to Petitioners and others to appear before the Court on October 28, 1994, to show cause, if they could, why Mrs. Flint's will of February 17, 1994, should not be probated. Petitioners, by counsel, entered an appearance and filed objections to the probate of Mrs. Flint's will. They eventually withdrew their objections of record, and the will was admitted to probate.

In the meantime, in May, 1993 (prior to Mrs. Flint's death), Petitioners filed Chancery No. 15055 which initially covered a variety of actions, including a challenge to the Trust and their father's will. Ida Flint died during the course of the litigation, her estate was added as a party, a countersuit was brought, and additional issues were added. The primary issue in that case eventually centered on whether the surviving Settlor of the Trust retained powers of revocation and amendment after the death of the first Settlor with respect to Trust A as identified thereunder. A series of rulings in 1996 construed and interpreted the Trust and upheld Ida L. Flint's right to revoke and amend Trust A of the Trust subsequent to Mr. Flint's death, thereby giving effect to the series of amendments referenced above. Petitioners appealed to the Virginia Supreme Court that portion of

Chancery No. 15055 which upheld the validity of Ida L. Flint's right to revoke and amend Trust A. The Supreme Court denied the Petition for Appeal on May 29, 1997 (Supreme Court Record No. 962224). They filed the instant matter on July 3, 1997, based on the foregoing facts which already had been considered in Chancery No. 15055.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI WHEN NO ERROR RELATING TO FEDERAL CONSTITUTIONAL ISSUES IS ASSIGNED, NOR WHERE SUCH CLAIMS WERE RAISED BY PETITIONERS OR CONSIDERED BY THE COURTS BELOW.

Petitioners assert that this Court has jurisdiction to entertain their writ pursuant to 28 USCS §1257 set forth above. However, Petitioners' Assignment of Errors are not based on any federal Constitutional or statutory claim in the Virginia courts. Allusions in the text of the Petition to possible violation of their equal protection and due process rights in the Courts below is a new argument and appears, at best, to be incidental to the Assignments of Error relating to the Virginia courts' rulings concerning prior adjudication. Federal Constitutional claims were not advanced in the Bill of Complaint, Amended Bill of Complaint, Response (or Supplement) to Demurrer or Plea in Bar, or Memorandum of Points and Authorities Re: Demurrer and Plea in Bar. They were not made in oral arguments on the Plea in Bar. The only vague reference of such claims in the record of this case at the Circuit Court level is found at the end of a hand-written statement at the end of Petitioners' objections to the entry of that court's final decree (p. 4a),

and the grounds for its assertion are unknown. The point having not been raised, the Circuit Court did not address federal claims.

Petitioners' Petition for Appeal to the Supreme Court of Virginia does not cite, and is in no way based on, any claim of denial of federal equal protection and due process rights as set forth in the U.S. Constitution. Thus, consideration of those rights was never before that court. In the concluding paragraphs of their Petition for Reconsideration of Petition for Appeal, Petitioners recite that their due process and equal protection rights were violated, but there is no reference to indicate that they are not alluding to due process rights accorded under the Constitution of the Commonwealth of Virginia at Article I, §11 thereof. In *Bowe v. Scott,* 233 US 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914), this Court dismissed a similar appeal from the Virginia Supreme Court for want of jurisdiction under practically identical circumstances, noting the existence of the Virginia Constitution's due process clause.

If federal issues were "not pressed or passed on" in the state courts, jurisdiction to entertain such issues for the first time will not lie or writ to the Supreme Court. See *Cardinale v. Louisiana,* 394 US 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969); *Illinois v. Gates,* 462 US 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). *Yee v. City of Escondido,* 503 US 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992). This long-standing rule of jurisprudence has its roots in predecessor statutes to 28 USCS §1257 and our system of federalism as outlined in *Owings v. Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell,* 10 Peters 368, 9 L.Ed. 458 (1836). The right to bring a matter from the state court is preserved only if the federal issue is set up and

claimed below. "It is settled that this court, on error to a state court, cannot consider alleged Federal question when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause." *Harding v. Illinois,* 196 U.S. 78, ___ , 49 L.Ed. 394, ___ , 25 S.Ct. 176, 178 (1904).

Further, this Court does not have jurisdiction to grant a writ of certiorari where there is no substance or color of merit to any substantial question of federal Constitution claim. The mere fact that a party asserts title under a clause of the Constitution is not in itself sufficient, unless there be at least a plausible foundation for such claim. "A party may assert a right, title, privilege, or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage." *Iowa v. Rood,* 187 US 87, ___ , 47 L.Ed. 86 ___ , 23 S.Ct. 49, 51 (1902). "A real, and not a fictitious, Federal question is essential to the jurisdiction of this court of the judgments of state courts." *Sawyer v. Piper,* 189 US 154, ___ , 47 L.Ed. 757, ___ , 23 S.Ct. 633, 634 (1903).

II.

THE APPLICATION OF THE JUDICIAL DOCTRINE OF PRIOR ADJUDICATION IN THIS CASE IS WHOLLY A MATTER OF VIRGINIA LAW WHICH THE COURTS BELOW CORRECTLY CONSIDERED AND APPLIED.

The Virginia Courts considered only the application of Virginia law to this matter. In so doing, they correctly applied the doctrine of prior adjudication, a concept present in all orderly jurisprudence, including federal law.

The instant case and Chancery No. 15055 are, in their essences, the same case, a fact dramatically demonstrated by noting that the petition for appeal to the Virginia Supreme Court in the instant case lifts its "question presented" (Petition for Appeal page *v*) *verbatim* from the same "question presented (no. 2, page *vii*) in Petitioner's petition for appeal in Virginia Supreme Court Record No. 962224. Further, as identified in Respondent's Brief in Opposition filed with the Virginia Supreme Court, significant portions of the text of the Petition for Appeal were adopted *verbatim* from the Petition for Appeal in the previous matter.

Petitioners and Respondent were among the parties in Chancery No. 15055. All of the documents (Trust, wills, deeds) relevant to this case were admitted and considered in Chancery No. 15055. Mrs. Flint's actions which Petitioners complained of in Chancery No. 15055 are the very same actions of which they complain now. The relief Petitioners sought in Chancery No. 15055 is the very same relief which they seek now. The claim that, by exercising said rights affirmed in Chancery No. 15055, Mrs. Flint breached a testamentary contract was raised or could have been raised in said matter and is thereafter barred under the doctrine of prior adjudication. In point of fact, Petitioners endeavored belatedly to raise this theory of claim in Chancery No. 15055. Respondent replied that the matter had not been well pled or properly raised.

The doctrine of prior adjudication (in Virginia and under federal law) is grounded in public policy considerations. "It 'proceeds upon the principle that one person shall not the second time litigate, with the same person . . . the same legal right, precisely the same question, particular controversy, or issue, which has been

necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit.' " *Ward v. Charlton,* 177 VA 101, 115, 12 S.E.2d 791, ___ (1941), quoting from *United States v. California Bridge & Construction Co.,* 245 U.S. 337, 341, 38 S.Ct. 91, 93, 62 L.Ed. 332. The reasoning behind the public policy was most eloquently stated by the Virginia Supreme Court in *Griffin v. Griffin,* 183 VA 443, 32 S.E.2d 700 (1945):

> "The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. The doctrine of res judicata rests upon the ground that the party . . . has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife but produces certainty as to individual rights and gives dignity and respect to judicial proceedings." *Griffin v. Griffin,* 183 VA 443, 452, 32 S.E.2d 700, ___ (1945)

The same Circuit Court judge presided over both cases and correctly recollected his consideration of the issues and documents, and the effect of its rulings, in Chancery No. 15055. The Circuit Court was very much aware that it could not hold in a subsequent case that Mrs. Flint's actual exercise of the rights it had upheld in the first case violated Petitioners' rights under the very same documents it had construed previously. The Circuit Court had construed the testamentary documents on

their merits in Chancery No. 15055. Petitioners merely seek to place another construction to them which would have the effect of overturning the court's construction in the prior case.

Petitioners' new construction seeks to employ Virginia's law regarding reciprocal will contracts as set forth in *Williams v. Williams*, 123 VA 643, 96 S.E. 749 (1918). As the court below pointed out, the *Williams* case did not in any way deal with a revocable trust or with pour over wills to a revocable trust (Transcript of January 9, 1998, pp. 29-31). Moreover, this doctrine is inapplicable because the wills are not reciprocal and there was no contract between Mr. and Mrs. Flint to leave their property to any given individuals. In the Circuit Court, Respondent raised this matter by filing a demurrer which said Court did not reach because of its disposition of the case on the plea in bar. Even if the Circuit Court had not found the doctrine of prior adjudication to be applicable, the case could have been decided for Respondent on demurrer.[5] [6]

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[5]Mr. Flint's will at article I(B) left his residuary estate to the Trustees of the Trust "to be held in trust under the terms in effect at my death" (emphasis added). Mrs. Flint's will at Article I(B) left her residuary estate to the Trustees of the Trust "to be held in trust under the terms in effect at my death" (emphasis added). By definition and as confirmed by the construction given in Chancery No. 15055, the Trust was not a static document. Its terms were subject to revocation and amendment (Trust Article 1(A)), even by the surviving Settlor after the death of the first to die. Thus, the wills contemplated and anticipated that Trust changes might take place such that Trust terms as cross-referenced by the wills would not necessarily be the same at any

[footnote continued]

[6]Appellee raised other points on demurrer such as (1) Petitioners' lack of standing because their interests (if any) were in

[footnote continued]

The terms of the documents said to comprise the "contract" are testamentary in nature, and there is nothing therein which suggests that the documents constitute a "compact" or contract disguised under the name and appearance of testamentary documents. In Virginia, testamentary documents in their nature are ambulatory or revocable, not intended or allowed to take effect until the death of the maker. See *Timberlake v. State-Planters Bank*, 201 VA 950, 115 S.E.2d 39 (1960). Mr. and Mrs. Flint's documents, Trust and wills alike, go to great lengths to confirm this inherent quality.

[footnote 5 continued]

given time and could be different on Mr. and Mrs. Flint's respective dates of death. The wills envisioned the possibility that their respective beneficiaries (the Trust at different given points in time) would be different. The documents envisioned that the wills each would speak at the respective deaths of the testators, not at the death of the first to die only. This explicitly confirmed the statutory and axiomatic rule of construction that a will speaks at the death of the testator. See Virginia Code §64.1-62 applied in *Yates v. Scales*, 244 VA 300, 421 S.E.2d 195 (1992).

[footnote 6 continued]

Trust; and (2) failure to name as party to the suit an indispensable party, to wit: the Trustee.

CONCLUSION

Based on the foregoing arguments and authorities, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 10, 1999

Supreme Court, U.S.
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No. 98-1098

In The

Supreme Court of the United States

October Term, 1998

J. HOWARD FLINT, JR., AND CARLON S. FLINT,

Petitioners,

v.

EVA L. DAVIS (IN VARIOUS CAPACITIES),

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENTS RESPONSIVE TO BRIEF IN OPPOSITION

Petitioners reliance on USCS § 1257 is in (3), where a . . . right, privilege . . . is specially . . . claimed under the Constitution . . . , is the issue for the U.S. Supreme Court to have jurisdiction under the 14th Amendment thereto. Petitioners did raise this 14th Amendment matter in the Circuit Court below (see for example, the Objection attachment to Final Decree in Chancery No. 17813 in the Appendix to the Petition, p. 7a, *17a*, and by reference thereto in the Request For Reconsideration (App. p. 18a, l's 3 & 4 thereof), Appeal Petition and Request for Reconsideration to the Virginia Supreme Court (p. 10, l. 12 in both, and p. 15, l. 1 also in the latter)).

The "How" of how the 14th Amendment rights are violated are especially set forth in the Appendix, pp. 7a-18a, that the Circuit Court and Virginia Supreme Court did not abide by the Virginia law because this "right" and "privilege" was violated by the Virginia Courts since the Circuit Court erred in its ruling as explained in the Objection to its decision, and since the Circuit Court never specifically stated why as it could not on the facts as explained in the Objection. Under the secrecy and circumstances made by the Respondents, as stated in the Petition, Petitioners could not make this issue earlier (see Circuit Court transcript, Jan. 9, 1998, p. 5, last line bridging to p. 6, l. 4, as to a verified copy of Mrs. Flint's 1998 will).

Mrs. Ida Flint was both (co-) Settlor *and Trustee*, and by her amendments to herself as Trustee (see top of p. 7 of Respondents Opposition brief) to remove her husband's heirs from the Trust A and from her estate, she violated her higher duties as Trustee where there was *conflict* of interest, and against Virginia law, section 64.1-67.2 and the IRS Code (previously cited App. p. 9a)

and as explained in the Alvarez decision (previously cited), among many, for *self engrandizement against the interest of her husband.* The *only issue* decided in Chancery No. 15055, as stated in the Petition to the U.S. Supreme Court, was in regards to Mrs. Flint's right to *revoke* (an error) and that she did. Therefore, nothing there in the Circuit Court involved the pair of 1988 identical wills or as they are a contract under the long-standing Virginia case law was ever raised or decided and thus was and is no bar as the Court later held (again, see the Objection, App., pp. 7a-18a). The Deed of Gift, also executed June 4, 1988, to transfer their 333 acre farm was the consideration by Mr. and Mrs. Flint to each other to perfect the contract created by their identical 1988 wills. That all the litigation is over the beneficiaries' interests, the various issues in such various litigations are not specifically alike, which the Virginia law for a res adjudicata requires (as explained in the Petition).

Withdrawal by the Flint brothers, Petitioners, in Chancery No. 15886, regarding the 1994 (second) will, was in view of Virginia law, as previously explained in the Petition. Such decided issue in that case (App. p. 25a regarding that will of decendent (sic), has no relationship to the pair of 1988 wills contract (as in the manner of the Williams v. Williams decision, cited and applied in the Petition), and thus neither that case nor the decision therein is the same subject matter then or with the decided issue in Chancery No. 15055 specifically for a res adjudicata.

Carlon Flint was pro se on the Virginia appeals and the instant petition because his attorney had withdrawn prior to the manifestation of those appeals and the instant one on the issue of this case, so that he had no attorney for the issue of these appeals. Subsequent to and immediately after Mr. Flint's death, his share of the Flint Trust

was distributed to fund trust B, the bi-pass trust, as the Trust required with the leftover of his share lodged into trust A with Mrs. Flint's share. Respondents reply is in error, p. 5, l. 26, since it was *Mrs.* Flint's share which did not require additional funding upon Mr. Flint's death. Trust B, in a hearing subsequent to the Circuit Court decision on the revocation, was found underfunded on two (2) counts of nearly 1/6 by the Trustees in a breach of fiduciary duty with an order by the Court to complement it fully (note footnote #4, p. 6 of Respondent's Reply).

A reading of the Williams v. Williams decision (cited in the Petition) certainly manifests *nothing* about a *revocable trust*, but it does deal with *identical* wills having consideration in the Court of *Equity* in Virginia, and need not state therein that the wills are a contract. Virginia law, as previously applied in the court below, permits a will to designate a trustee of a trust to receive the benefits of the will(s), which trust designated in the Will(s) itself recites those who are heirs to the property. Respondent's reply makes no mention of Article I(C) in both of Mr. and Mrs. Flint's wills, where a *testamentary* trust is recited (by incorporation) and this never was considered by the Circuit Court (Respondents' direct ascertion to the contrary not withstanding in her Brief in Opposition, p. 12, last line bridging to p. 13) because that Court was merely considering the separate inter vivos trust document.

From Mr. Flint's death, *Petitioners had standing* via his 1988 will and Trust B. In a will contract, per the Williams v. Williams dictum, wills in a contract situation are no longer ambulatory after the death of the first party thereto. So called contributions by Mrs. Flint of additional assets to the trust (A) some time after Mr. Flint's death, were largely from assets Mrs. Flint as Trustee withheld from the Flint Trust for several years, when in fact the Flint Trust at Article 2, said they "*have*" put *all*

their assets into the Trust on a 1 to 1 share basis, which she as Trustee did not do, including a large value of stock which was in his name only but which she had appropriated, all brought out in filed papers and in hearings before the Circuit Court.

Certainly all the documents from Chancery No. 15055 were admitted, but *no explanations* as to the issues therewith were made, which were absolutely different than actions in this case here on Petition. These documents did not and could not include Mrs. Flint's 1988 Will because Respondents have never submitted (and refused to) the original of that 1988 Will in Chancery No. 15055, or at any time since, for the Court below to make any decision with respect thereto. Respondent constantly states (see bottom of Opposition reply page 11) there must be "precisely the same question . . . issue . . . which had been tried and finally determined upon the merits" but then in fact were not in Chancery No. 15055 as the issue in the instant case on the wills contract, which the Circuit Court decision in Chancery No. 15055 shows (App. pp. 19a, 21a, & 22a) it *did not* do. A "different construction" is certainly a *different issue.*

There is indeed error by the Virginia Courts failing to follow Virginia law, as previously explained, and thus there is denial of the U.S. Constitutional Rights of the 14th Amendment as to the rights and privileges granted therein and as extended to one in the States under the State laws, here ignored and abridged and asserted in the Circuit Court and both appeals to the Virginia Supreme Court (supra). One cannot assert such a right in a lower Court until the need arises and one sees it as being denied during Court Proceedings because one must and should presume the Court will be fair and administer justice according to the laws, until it is obvious otherwise. Oral arguments were indeed made before the Circuit

Court on these U.S. Constitutional rights of the 14th Amendment, Respondent's remarks to the contrary notwithstanding. The hand written statement (referred to in the opposition reply, bottom of p. 8) was quickly followed by the same typewritten (see App. pp. 7a-18a of the Petition). Certainly a State Circuit Court cannot directly address federal claims because it lacks Jurisdiction (except to note it – as the Court has several times orally). Even though Petitioners are pro se, they have made and preserved their Federal Constitutional rights from the Circuit Court through the Virginia Supreme Court to now. This Petition is directly related to the Wills contract plead, but improperly denied on a res adjudicata, later asserted, and thus there is indeed denial of our U.S. 14th Amendment rights (see Circuit Court transcript, Jan. 9, 1998, pp. 17-36, regarding the reasons for no res adjudicata).

Respondents footnote #3, bottom of p. 5, asserting several criticisms of Petitioner's "Statement of Facts" and a demand to correct under rule 15.2, is not only totally absurd since the facts are correct, but in no way specifically points out where any errors may be. The above arguments are made wholly in response to Respondents Brief in Opposition.

Noted typographical errors in Petitioner's brief are: p. iii, Table of Contents, appendix, l. 2, "1988" is 1998; appendix p. 25a, l. 6, the last word is *decedent*; p. 4, l. 9, correct spelling of *Settlors*; p. 17a, l. 8, correct spelling of Equity.

Respectfully submitted,

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